93-825

No. 93-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
NOV 23 1993
OFFICE OF THE CLERK

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORP., *et al.*,
Petitioners,
VS.
SHELL OIL COMPANY, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is "but for" causation a necessary element of the standard of "antitrust injury," as enunciated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 489?

2. Where several plaintiffs sue for injunctive relief under the Clayton Act, and all but one of them have been driven out of business, may the surviving plaintiff be granted the requested injunctive relief?

PARTIES BELOW

The appellants in the court of appeals were Greater Rockford Energy and Technology Corp.; Shepherd Oil, Inc.; Vidalia Ethanol, Ltd.; Alpebo, Inc.; Shreveport Ethanol, Inc.; Lakefield Ethanol, Inc.; A.E. Montana, Inc.; Cajun Energy, Inc.; Public Terminals, Inc.; Cepo. Inc.; Texas Ethanol Producers; Wurster Oil Company, Inc.; and High Plains Corp., which are petitioners here. Petitioners' listing of subsidiaries and affiliates pursuant to Rule 29.1 appears in Appendix E, page 93a, *infra*.

The appellees below were Shell Oil Company; Marathon Petroleum Company; Amoco Oil Company; Chevron U.S.A., Inc.; Atlantic Richfield Co.; B.P. America; Exxon Company, U.S.A; and Mobil Oil Corporation, which are respondents here.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix A, page 1a, *infra*) is reported at 998 F.2d 391. The opinion of the district court (App. B, page 26a, *infra*) is reported at 790 F.Supp. 804.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1993. A timely petition for rehearing and suggestion for rehearing in banc were denied on September 2, 1993 (App. A at 24a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

Section 1 of the Clayton Act, 15 U.S.C. § 12, in pertinent part provides:

> "Antitrust laws," as used herein, includes the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety . . . and also this Act.

Section 4 of the Clayton Act, 15 U.S.C. § 15, in pertinent part provides:

> (a) Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

15 U.S.C. section 26a, a recently enacted amendment to the Clayton Act, in pertinent part provides:

> (a) Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that —
>
> (1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or
>
> (2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in which

> such synthetic or conventional motor fuels is sold for use, consumption, or resale within the United States.

(Section 26a is set forth in full at App. C, page 67a, *infra*. Section 26a was enacted as an amendment to the Clayton Act on December 2, 1980 by Pub. L. 96-493, 94 Stat. 2568. The amending statute designated Section 26a as the "Gasohol Competition Act of 1980". Senate Report No. 96-868 is set forth in full at App. D, page 69a, *infra*.)

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...

STATEMENT OF THE CASE

Introduction and Summary.

This is an antitrust action, brought by manufacturers of ethanol against a number of major petroleum companies. Plaintiffs charged defendants with a number of offenses aimed at suppressing the sale of gasoline blended with ethanol, to the benefit of the sale of pure gasoline, and with alleged violations of Sherman Act section 1 (15 U.S.C. § 1) and of the Gasohol Competition Act, Clayton Act section 26a (15 U.S.C. § 26a). The district court dismissed the case in its entirety on summary judgment, on the ground that plaintiffs lacked antitrust standing.

The Court of Appeals affirmed the summary judgment, but on different grounds. With respect to the Sherman Act section 1 claim, it held that plaintiffs had not presented evidence tending to show an agreement to restrain trade. App. A at 7a. This portion of the Court of Appeals' ruling is not a subject of the present petition. The Court further held that, although there was a genuine issue of fact as to whether defendants violated the Gasohol Competition Act, plaintiffs failed to meet their burden of showing "antitrust injury," solely because it interpreted the antitrust injury standard to embrace an entirely unprecedented re-

quirement of a showing of "but-for" causation. This latter ruling, which is totally at odds with the long-standing rules of this Court and of all the other circuits regarding the required causation showing in antitrust actions, is the subject of the present petition.

Background.

Parties. Thirteen plaintiffs brought this action. Eleven plaintiffs are or at the time of the complaint were manufacturers of denatured fuel ethanol. Two of the plaintiffs, Cajun Energy/Public Terminals and Wurster Oil Company, were blenders, engaged in combining ethanol with gasoline to make the motor fuel gasohol. Today only High Plains Corporation remains active in manufacturing ethanol. Defendants, among other things, are engaged in producing and refining crude oil and marketing the motor fuel gasoline.

Motor fuels market. Ethanol is a type of alcohol that may be produced from grain or molasses based raw materials and that functions as a motor fuel when combined with gasoline. Gasoline is a petroleum-based motor fuel. Combining one part ethanol with nine parts unleaded gasoline increases the octane rating of the resulting motor fuel, which is known as gasohol. Thus, the use of gasohol as a motor fuel displaces one of every ten gallons of gasoline that would otherwise be consumed as motor fuel.

Motor vehicles fueled on gasohol operate in the same manner as those using 100% gasoline. Automobile manufacturers have indicated that using gasohol will not affect new car warranties. Gasohol is generally sold at retail for less than the comparable octane grade of unleaded gasoline. The marketing of gasohol in competition with gasoline reduces the output, sales and profits of firms engaged in the manufacture and sale of only the petroleum-based fuel gasoline.

Application of the Clayton Act. In 1980 Congress, responding to the nation's need to reduce its dependence on imported oil and recognizing the potential threat to the expanded use of substitute fuels posed by the oil companies' control over the channels of motor fuel distribution, enacted the Gasohol Competition Act, 15 U.S.C. § 26a. The purpose of this statute was to outlaw practices

that discriminate against or unreasonably limit the sale of gasohol or other synthetic fuels. App. D at 69a.

Congress intended the legislation, an amendment to the Clayton Act, to expedite the opening of the existing motor fuels network to new products, and it specifically recognized that protracted litigation would otherwise probably be necessary to assure gasohol would have access to all service stations that wished to sell gasohol. App. D at 81a.

The Record of Violations Before the District Court and Court of Appeals.

The record in this case shows that many oil companies, including defendants, acted in concert and individually to restrict the consumption of gasohol and to exclude gasohol from the existing motor fuels network. Defendants engaged in many practices aimed at preventing their franchised dealers from offering gasohol to consumers, hindering the ability of independent distributors to handle gasohol if they wished to purchase gasoline from defendants. Defendants also diminished demand for gasohol by taking steps to induce the false belief that gasohol is an undesirable motor fuel. Defendants' unlawful conduct included, among others, such practices as:

- Refusing to permit the use of existing tanks and pumps (regardless of ownership) for the storage and dispensing of gasohol. Sen.Rep. No. 96-868, 96th Cong., 2d Sess. at 11 (1980), App. D at 85a.
- Using and requiring franchised dealers to use unreasonable point of sale advertising announcing that there was "NO ALCOHOL" in defendants' products, thus implying that a motor fuel such as gasohol containing alcohol was bad or harmful to motor vehicles. (The Act allows only a reasonable label on pumps *dispensing* gasohol informing the buyer of the product's origin and appropriately disclaiming product liability from the use of gasohol, 15 U.S.C. §§ 26a(b)(3)(A) and (B).)
- Refusing to allow their credit cards to be used to purchase gasohol, imposing credit charges on gasohol sales that

were not imposed on gasoline sales, instituting procedures and notations on credit card receipts for the sale of gasohol, and limiting the use of credit instruments in the sale of gasohol made by dealers and jobbers. 15 U.S.C. section 26a(a)(1).

- Prohibiting the storage of ethanol at their terminals, thus preventing the blending of ethanol with gasoline at such terminals, while simultaneously permitting the storage and blending of detergent and other additives at the same terminals. 15 U.S.C. section 26a(a)(2).
- Restricting the manner in which jobbers would be allowed to sell gasohol from defendants' terminals. 15 U.S.C. section 26a(a)(2).

These practices and defendants' other acts excluded gasohol from the existing motor fuels network. They prevented sales of ethanol and gasohol from growing as they would have in an unconstrained motor fuels market. Defendants' conduct caused plaintiffs to lose sales that otherwise would have been made, and thus defendants are responsible for plaintiffs' lost profits and the business failures that many plaintiffs suffered.

Procedural History.

Plaintiffs filed suit under the Clayton Act on June 1, 1988 in the Central District of Illinois. The complaint alleged violations of Sections 1 and 2 of the Sherman Act and of Section 26a of the Clayton Act, and sought treble damages and injunctive relief.

Defendants moved to dismiss the complaint on the ground that plaintiffs lacked antitrust standing. By order dated April 17, 1989, the Honorable Harold A. Baker denied the motion. After the case was transferred to the Honorable Richard Mills, defendants filed a motion for judgment on the pleadings, arguing that plaintiffs lacked antitrust standing. On November 9, 1990, Judge Mills denied the motion without prejudice to the filing of a motion for summary judgment after discovery closed. On December 3, 1990, the court scheduled a final pretrial conference for April 27, 1992 and set trial for May 18. Subsequently, defendants moved for summary judgment, arguing that plaintiffs lacked antitrust stand-

ing. On April 24, 1992, the district court granted that motion, dismissing the case. 790 F.Supp. 804, App. B at 26a.

Plaintiffs timely appealed the grant of summary judgment on lack of standing to the Court of Appeals for the Seventh Circuit. The court recognized that Section 26a protects the interests of ethanol manufacturers and gasohol blenders, App. A at 16a-17a, but did not reach the issue of standing. Instead, it affirmed the dismissal of the Sherman Act claim on the ground that plaintiffs did not show a genuine issue of material fact regarding the substantive violation, and affirmed the dismissal of the Gasohol Competition Act claim because of a lack of "antitrust injury". (Only this latter ruling is the subject of the present petition.) Rehearing was denied. 998 F.2d 391, App. A at 24a.

The Court of Appeals' Opinion.

The present petition addresses the Court of Appeal's determination that plaintiffs' claims of violations of the Gasohol Competition Act did not show "antitrust injury."

The Seventh Circuit found that there was a genuine issue of fact as to whether defendants violated the Gasohol Competition Act, Clayton Act section 26a. The court found that the failure of the oil company defendants to allow their dealers' tanks and pumps to be used for the sale of gasohol, and their limitations on the use of credit instruments in the sale of gasohol, to be per se violations of the Act. App. A at 12a-14a. The tanks and pumps prohibition that the court found mirrors the Congressional intent to require that oil companies "permit existing tanks and pumps to be used for gasohol." App. D at 85a.

The Seventh Circuit did not reach the district court's ruling that plaintiffs lack standing. Instead, although it found that Congress intended Section 26a to foster the growth of ethanol producers and gasohol sellers (App. A at 16a-17a, the court of appeals affirmed the judgment by holding that plaintiffs failed to show antitrust injury, an issue the district court did not decide. App. A at 2a.

The Seventh Circuit's opinion turns on the appellate court's importation of a strict "but-for" causation standard to the notion

of "antitrust injury." The Seventh Circuit's definition of antitrust injury includes the following element: "whether the violation was the cause-in-fact of the injury: that 'but for' the violation, the injury would not have occurred." App. A at 6a and 23a.

Having held that "but-for" causation is an element of antitrust injury, the court then discussed eight factors that defendants identified as possible alternative causes of plaintiffs' injuries. It found under its "but for" rule that "no reasonable trier of fact could find that the violation *caused* the plaintiffs' injuries." 19a-23a (emphasis in original).

Specifically, the court observed that: "Standing alone one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question." App. A at 23a. It then encapsulated its causation-in-fact analysis and "but for" antitrust injury requirement by holding:

> "Taken together, [defendants' possible alternate causes of the plaintiffs' injuries demonstrate that] plaintiffs have failed to show with a fair degree of certainty that 'but for' the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain. Consequently, as a matter of law the plaintiffs have failed to show antitrust injury and summary judgment was, therefore, appropriate."

App. A at 23a.

The court also held that the plaintiffs' failure to show antitrust injury "is fatal to their claim for injunctive relief" under Section 16 of the Clayton Act. App. A at 23a. It further held that denial of injunctive relief was "buttressed" by the fact that "all but one of the plaintiffs have gone out of business." App. A at 23a.

REASONS FOR GRANTING THE WRIT

I.

THE IMPACT OF THE SEVENTH CIRCUIT'S DECISION

The decision of the Court of Appeals radically rewrites the standards for proving causation in antitrust actions in a way that

seriously impairs the enforcement of the antitrust laws. The decision also directly contradicts the principles of antitrust causation laid down by this Court and followed in every other judicial circuit.

Under the rubric of "antitrust injury," the Seventh Circuit has read into the antitrust laws a requirement that plaintiff show that defendants' offense caused plaintiffs' injury under a standard of "but for" causation. This new standard stands in stark contrast to the rules laid down by this Court and followed by the other circuits for proof of causation: that defendants' acts are a "material" or "substantial" cause of the injury. Moreover, since a "but for" causation rule is entirely unworkable in the antitrust context, the Seventh Circuit's new causation rule places a virtually insurmountable burden on private antitrust enforcement.

This problem is particularly acute in the arena of gasohol marketing, where the present controversy lies. Congress passed the Gasohol Competition Act expressly to advance "the rapid and effective development of viable alternative fuels to offset our dangerous dependence on insecure and costly sources of foreign oil." Sen.Rep. No. 96-868, 96th Cong., 2d Sess. at 1-3 (1980), App. D at 69a-71a. The Seventh Circuit's importation of a new and far more onerous causation requirement into actions brought under the Act directly defies Congress's intention of creating a new and expeditious means of heading off the offenses found in this case to have been committed:

> "The committee is also aware of the protracted nature of the litigation that would, in all probability, be necessary to assure all service station dealers a right to market gasohol at their stations under the applicable antitrust provisions. Because of the national energy emergency, any delay in assuring the fullest opportunities for competitive marketing of gasohol through the existing network of service station outlets would be intolerable. We must provide as soon as is possible a business climate that will encourage all those who want to market gasohol — for business as well as patriotic reasons — to do so now."

Sen.Rep. No. 96-868, 96th Cong., 2d Sess. at 9 (1980), App. D at 81a.

The Seventh Circuit's flouting of Congress's intent is even more egregious given that, unlike certain other provisions of the antitrust laws, the Gasohol Marketing Act does not provide for criminal penalties. The government is empowered to stop antitrust violations through its criminal enforcement powers, without regard to any showing of "antitrust injury" or causation. In the present case, however, the court below has taken a per se violation, an offense that Congress specifically wanted to stop in its tracks, and rendered it irremediable if the court's opinion is allowed to stand.

II.

THE STANDARD OF PROOF OF CAUSATION IN ANTITRUST CASES ESTABLISHED BY THIS COURT AND FOLLOWED IN EVERY OTHER CIRCUIT

The question of proving causation in an antitrust case has frequently been addressed in the cases, usually under the nomenclature of "fact of damage" or "impact." The seminal case on this issue is *Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100. There the Court reversed a Court of Appeals determination that plaintiff could not show that defendants' acts caused its injuries, and explained the standard as follows:

> "[Plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

395 U.S. at 114 n.9 (emphasis in original).

This result merely reiterated this Court's earlier delineations of the causation standard: "We think the jury should be allowed to determine whether [defendants'] conduct materially contributed

to . . . [plaintiff's] damage." *Continental Ore Co. v. Union Carbide & Carbon Corp.* (1962) 370 U.S. 690, 702.

As might be expected, the "material cause" standard has been followed in every other judicial circuit that has addressed the question[1]:

- *Engine Specialties, Inc. v. Bombardier Ltd.* (1st Cir. 1979) 605 F.2d 1, 14, *cert. denied* (1980) 446 U.S. 890 ("[P]laintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause.");
- *Irvin Industries, Inc. v. Goodyear Aerospace Corp.* (2d Cir. 1992) 974 F.2d 241, 245 ("[Plaintiff] can establish this causal connection by demonstrating that [defendant's] conduct was a substantial or materially contributing factor in its injury." (quotation marks omitted));
- *Indian Coffee Corp. v. Procter & Gamble Co.* (3d Cir. 1985) 752 F.2d 891, 903, *cert. denied* (1985) 474 U.S. 863 ("The plaintiff's burden of proving fact of damage under section 4 of the Clayton Act is satisfied if the illegality is shown to be a material cause of the injury.")
- *Advance Business Systems & Supply Co. v. SCM Corp.* (4th Cir. 1969) 415 F.2d 55, 63, *cert. denied* (1970) 397 U.S. 920 ("The plaintiff's burden of proving fact of damage under section 4 of the Clayton Act is satisfied by the showing of *some* damage arising from a given antitrust violation . . . .");
- *Affiliated Capital Corp. v. City of Houston* (5th Cir. 1984) 735 F.2d 1555, 1564, *cert. denied* (1986) 474 U.S. 1053 ("[A] plaintiff seeking damages for an antitrust injury need

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[1]Indeed, prior to the present decision, even the Seventh Circuit followed this court's standard for proof of causation of injury. See, 3.g., *Bohack Corp. v. Iowa Beef Processors, Inc.* (7th Cir. 1983) 715 F.2d 703, 711: "[T]he proposition that the violation was at least a material cause of the plaintiff's injury must be established by a preponderance of the evidence."

only prove with a fair degree of certainty that the defendant's illegal conduct materially contributed to his injury.");

- *Allied Accessories & Auto Parts Co., Inc. v. GMC* (6th Cir. 1987) 825 F.2d 971, 973 ("It is enough that the illegality is shown to be a *material cause* of the injury ...." (quoting *Zenith*; emphasis in original));
- *Alexander v. National Farmers Organization* (8th Cir. 1982) 687 F.2d 1173, 1210, *cert. denied* (1983) 461 U.S. 937-938 ("Here, there is no doubt that the unlawful conspiracy was the material cause [of plaintiff's injury.]")
- *William Inglis & Sons v. Continental Baking* (9th Cir. 1991) 942 F.2d 1332, 1339 ("Plaintiff was able to satisfy the causation requirement by establishing that the anticompetitive activities were a material cause of *some* of its injury ...." (emphasis in original, quotation marks omitted));
- *King & King Enterprises v. Champlin Petroleum Co.* (10th Cir. 1981) 657 F.2d 1147, 1156-57, *cert. denied* (1982) 454 U.S. 1164 ("It is enough that the illegality is shown to be a material cause of the injury ...." (quoting *Zenith*));
- *Construction Aggregate Transport v. Florida Rock Industries* (11th Cir. 1983) 710 F.2d 752, 783 ("[I]t is enough that the illegality is shown to be a material cause of the injury ...." (quoting *Zenith*));

In contrast, the Seventh Circuit supports its decision by citing only one case authority that actually embraces the "but for" causation formulation: *Argus Inc. v. Eastman Kodak Co.* (2d Cir. 1986) 801 F.2d 38, 41, *cert. denied* (1987) 479 U.S. 1088. This decision appears to be superseded in the Second Circuit by the *Irvin Industries* case, noted above. To the extent that it continues to state the law in the Second Circuit, it merely serves to underscore the split among the circuits requiring resolution by this court.

More generally, the courts have until now regularly rebuffed the type of analysis adopted by the Seventh Circuit here: defeat of plaintiff's claim solely by reference to defendant's alternative explanations of injury[2]:

- *Haverhill Gazette Co. v. Union Leader Corp.* (1st Cir. 1964) 333 F.2d 798, 806, *cert. denied* (1964) 379 U.S. 931 (If the trial court were to put the burden on plaintiff "to eliminate all proper causes for [injury suffered] to the extent of showing that the illegal causes were the sole or most substantial, we consider this too lenient treatment of a deliberate wrongdoer.")
- *Engine Specialties, Inc. v. Bombardier, Ltd., supra*, 605 F.2d at 14 ("Plaintiffs need not prove that the antitrust violation was the sole cause of their injury . . . .");
- *Weiman v. Kroehler Mfg. Co.* (7th Cir. 1970) 428 F.2d 726, 729 (Plaintiff is required "to show only that defendant's illegal conduct 'materially contributed' to plaintiff's injury, notwithstanding the existence of other significant causative factors.");
- *Switzer Brothers, Inc. v. Locklin* (7th Cir. 1961) 297 F.2d 39, 47, *cert. denied* (1962) 369 U.S. 851 ("A violation of the antitrust laws is answerable in treble damages for injury to another by the unlawful act even though other factors may have contributed to the injury");
- *Morgan v. Ponder* (8th Cir. 1989) 892 F.2d 1355, 1363 ("[W]e need not determine the exact cause of the [plaintiff's] demise. . . Nor must plaintiffs systematically eliminate all possible non-predatory causes.");

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[2]Indeed, the Seventh Circuit previously joined the other circuits in rejecting the analysis applied in the present case. See, *Tire Sales Corp. v. Cities Service Oil Co.* (7th Cir. 1980) 637 F.2d 467, 474, *cert. denied* (1981) 451 U.S. 920 (plaintiff entitled to prevail, even though "[i]t may well be true, as the trial court found, that some of plaintiff's losses were attributable to other causes as well . . . .")

- *William Inglis & Sons v. Continental Baking, supra*, 942 F.2d at 1339 ("[W]hether [plaintiff] proved that [defendant] caused *all* the claimed injury is properly an issue affecting only the amount of damages proved." (emphasis in original));
- *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation* (9th Cir. 1990) 906 F.2d 432, 462-463, *cert. denied* (1991) 111 S.Ct. 2274, 114 L.Ed.2d 725 (District court decision granting summary judgment by accepting defendants' alternative explanations for causes of injury must be reversed because the court "misconceived the nature of its task" in deciding summary judgment.)

All of these results, of course, are just reiterations of this Court's venerable *Zenith* rule: "[A] plaintiff need not exhaust all possible sources of injury in fulfilling his burden of proving compensable injury under § 4." 395 U.S. at 114, n.9.

In summary, both this Court and the circuit courts have long recognized that plaintiff can prove the fact of injury in an antitrust case by showing that defendant's violation was a "material cause" of the injury, without having to show that the injury would not have occurred "but for" defendant's malfeasance. With the decision below, the Seventh Circuit has split itself off from this long line of authority.

III.

THE SEVENTH CIRCUIT HAS CREATED A RADICAL NEW RULE OF ANTITRUST CAUSATION

In the decision below, the Seventh Circuit accepted defendants' assertions that other causes might have contributed to plaintiffs' injuries. App. A at 19a-23a. In light of these alternative explanations, it concluded that "the plaintiffs have failed to show with a fair degree of certainty that 'but for' the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain." App. A at 23a. The court below therefore replaced this Court's well-entrenched "material cause" standard

for proof of causation with the far more onerous "but for" causation standard.

Given the solid entrenchment of the "material cause" standard for proof of fact of injury, it might at first blush appear to be difficult for the Seventh Circuit to interject a completely new standard without doing violence to the earlier case law. The court achieved this feat through an analytical trick; instead of basing its decision on the fully circumscribed "fact of injury" standard, it instead rested its decision on the completely distinct doctrine of "antitrust injury." In effect, the circuit court used the antitrust injury doctrine as a Trojan Horse, through which it could introduce a new and more onerous causation standard to antitrust.

The leading statement of the antitrust injury doctrine appears in this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477:

> "[For] plaintiffs to recover . . . they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

Id. at 488-489 (emphasis in original).

The point of the *Brunswick* case, and of all antitrust injury decisions that have followed it, is that plaintiff can recover only if the injury it sustained is a result of an injury to the competitive market, which is the evil that the antitrust laws are designed to prevent. In the present case, the Seventh Circuit expressly held that plaintiffs' allegations met this test: "Upon reviewing the purposes of the Gasohol Act, we believe that the plaintiffs have alleged the type of injury the Act was intended to avert." App. A at 14a-15a.

However, the Court of Appeals did not stop its analysis at this point. Instead, it read into the antitrust injury standard a new requirement of "but for" causation. Specifically, the court held that "[t]o satisfy the antitrust injury requirement, a § 4 plaintiff must show . . . that 'but for' the alleged violation, the injuries would not have occurred." App. A at 18a. This was the court's

sole basis for refusing to reverse the district court's decision. Therefore, in the guise of analyzing the antitrust injury standard, the court introduced an entirely new requirement that an antitrust plaintiff must prove "but for" causation of its injuries to proceed against defendant.

While the notion of causation is implicit in the antitrust injury standard, which requires that the injury "flow[ ] from" that which make defendant's acts unlawful (*Brunswick*, 429 U.S. at 489), there has never before this decision been any suggestion that the causation standard is any different from what has always been required to prove fact of injury. Indeed, *Brunswick* is quite clear on this point: "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Ibid.* A requirement that plaintiff should show that its injury *reflects* an anticompetitive effect is very different from a requirement that it prove that its injury would not have occurred *"but for"* defendants' actions.

The Seventh Circuit does cite authorities for its proposition that the "but for" causation rule is an element of antitrust injury, but the authorities cited do not support the court's conclusion. The court derives its proposition that the antitrust injury standard embraces "but for" causation from three sources. App. A at 18a.

First, the court cites *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.* (7th Cir. 1983) 708 F.2d 1081, 1161, *cert. denied* (1983) 464 U.S. 891. However, on the subject of causation, *MCI* merely notes that "the courts have been consistent in requiring plaintiff to prove in a reasonable manner the link between the injury suffered and the illegal practices of the defendant." *Ibid.* (emphasis in original) Proving a "link" in a "reasonable manner" is certainly not equivalent to requiring a showing of "but for" causation.

Second, the court cites Areeda & Hovencamp, Antitrust Law ¶ 334.3a (Supp. 1991). However, this treatise section simply notes that the notions of antitrust injury and causation are elastic and often confused — as the present decision amply illustrates — and concludes that an attempt to distinguish one term

from another in application is often pointless. It does not argue in favor of "but for" causation as an element of antitrust injury.

Finally, the court cites Page, *The Scope of Liability for Antitrust Violations*, 37 Stan L. Rev. 1445, 1461 (1985). This highly theoretical antitrust economics article does assume, without citing authority, that there is a "but for" causation element to the antitrust injury doctrine. The article advocates a new standard for the antitrust injury doctrine, that plaintiff should be required to show that the *inefficiency* of defendant's actions caused plaintiffs' harm. Interestingly, the article notes that at least three circuit court rulings are contrary to its analysis. *Id.* at 1471-1472.

Additionally, the Court of Appeals described three cases that supposedly illustrate application of the rule that "but for" causation is an element of antitrust injury. The first, the Second Circuit's decision in *Argus Inc. v. Eastman Kodak Co., supra*, 801 F.2d at 41, is, as noted above, the only circuit court case cited by the Seventh Circuit that actually does recite a "but for" rule for proving fact of injury (unrelated, however, to the proof of "antitrust injury").

The remaining two authorities described in the decision do not remotely support the Seventh Circuit's new rule. The next decision cited, *Southwest Sheet Metal Works, Inc. v. Semco Mfg., Inc.* (5th Cir. 1986) 788 F.2d 1144, 1145-1147, *cert. denied* (1987) 480 U.S. 917, does note that plaintiff did not prove that its injury would have occurred but for defendants' acts, but does not stop there; it further concludes that plaintiff failed to show that those acts "exert[ed] such an influence" on others as to affect plaintiffs' profits. *Id.* at 1147. The final decision cited, *Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n* (D.C. Cir. 1981) 663 F.2d 253, 268-72, *cert. denied* (1982) 455 U.S. 928, merely held that plaintiffs' proof of causation was too speculative, and concluded that "[i]t would take far more detailed proof than the *ipse dixit* of [plaintiff's] owners to show that there was a causal connection" between defendants' acts and plaintiffs' injuries. *Id.* at 270. Clearly, both cases proceed on a "material cause" instead of a "but for" standard of causation.

Thus, although it declines to acknowledge the fact, the Seventh Circuit has in the decision below launched a radically new standard for proving antitrust causation.

IV.

THE SEVENTH CIRCUIT'S NEW "BUT FOR" CAUSATION RULE IS TOTALLY INAPPROPRIATE IN THE ANTITRUST CONTEXT

The vice of the Seventh Circuit's "but for" causation rule in the antitrust context is not simply that it is contrary to the law laid down by this Court and followed in other circuits. Rather, the problem is that the "but for" causation rule is conspicuously inappropriate in antitrust cases.

Obviously, the Seventh Circuit adopted its "but for" causation rule directly from tort law. See, App. ##a [5-6], where the court analogizes the elements of an antitrust claim to the elements of a tort claim, and equates antitrust standing with the tort concept of "causation, including both causation in fact, or 'but for' causation, and legal, or proximate cause." (In contrast, this Court has recognized that antitrust standing is different from, although no less elusive than, the tort concept of proximate cause, which it has described as "hardly a rigorous analytic tool." *Blue Shield of Virginia v. McCready* (1982) 457 U.S. 465, 477 and n.13.)

Interestingly, in comparing the elements of an antitrust claim to those of a tort claim, the Seventh Circuit equated "antitrust injury" with the tort concept of "damage or injury to a legally recognized interest," not to any standard of causation. App. A at 5a. Nevertheless, by the time it gets around to affirming the dismissal of plaintiffs' claims on antitrust injury, the court has imported the "but for" causation standard into the antitrust injury standard. App. A at 18a.

What is important, however, is not how the court reached this conclusion, but the effect of its having done so. Whatever application the "but for" causation standard might have to garden variety tort law, it is a wholly inappropriate standard to be engrafted onto antitrust law.

In tort law, the "but for" causation rule can be summarized as follows:

> "The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event if the event would have occurred without it. As a rule regarding legal responsibility, at most this must be a rule of exclusion . . . ."

W. Keeton, Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 41, at p. 266.

However, the "but for" rule does not serve the analysis of causation in non-linear, multiple cause or complex situations:

> "Restricted to the question of causation alone, and regarded merely as a rule of exclusion, the 'but for' rule serves the greater number of cases; but there is one type of situation in which it fails. If two causes concur to bring about an event, and either one of them, operating alone, would have been sufficient to cause the identical result, some other test is needed."

W. Keeton, Prosser and Keeton on the Law of Torts § 41, at p. 266. The markets where competition is restrained and other loss-causing conduct occurs are indeed susceptible to two or more causes that can concur to bring about an event. In fact, the everyday character of markets is infinitely more complex than the typical tort setting of multiple causes where the "but for" rule already is of little help.

The "some other test" that the tort commentators say is needed for complex situations is a "material element and substantial factor" analysis. "The defendant's conduct is a cause of the event if it was a material element and a substantial factor in bringing it about." W. Keeton, Prosser and Keeton on the Law of Torts § 41, at p. 267. This rule has found "general acceptance." *Ibid.*; Restatement Second of Torts § 431. This is, of course, precisely the rule this Court has stated for antitrust causation: "It is enough that the illegality is shown to be a material cause of the injury . . . ." *Zenith,* 339 U.S. at 114, n.9.

Thus, even in the tort law context, the "but for" rule is falling into disfavor and is being displaced with a "substantial factor" test. *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1048-1054. The issue on this petition, however, is not the proper standard for tort law, but rather the narrower one of whether "but for" causation should be imported into antitrust law.

The shortcoming of the "but for" rule — its presumption that single events are indispensable links in a single chain of events leading to the injury — makes it particularly inappropriate for application to an antitrust action. "But for" might serve the analysis of a procession of events governed by the laws of physics — a slip and fall resulting in a broken arm; a spark from a locomotive setting afire a field of grass that burns down a barn killing the cow inside and resulting in the death of a dog that ate some of the dead cow.

Markets, however, are complex, and business injuries do not necessarily result from linear chains of events. Compared to accident or physical disaster reconstruction techniques, the economics that helps explain markets is a very inexact science. Accordingly, "but for" analysis does not serve antitrust causation analysis, as this Court has expressly recognized:

> "Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. *The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation.*"

J. Truett Payne Co. v. Chrysler Motors Corp. (1981) 451 U.S. 557, 566 (emphasis added).

In the antitrust context there is typically more than one cause for any market event. Markets, by definition, reflect the interaction of myriad factors often difficult to identify. Economists do not have a crystal ball. They will always have differing opinions about the competitive price absent a conspiracy, or a competitor's profits, if any, absent a restraint of trade. Thus, if a "but for" rule

is flawed when applied in tort law to multiple causation situations, it would have to be *a fortiori* flawed if applied to antitrust economics. It is not surprising, then, that this Court and others have adopted in antitrust cases the same "material element and substantial factor" test advanced by the tort commentators as a preferred alternative to the "but for" causation test.

The summary judgment context of the present decision makes the result particularly troublesome. The decision does not mention plaintiffs' evidence, but instead concludes that defendants identified so many possible alternative causes for plaintiffs' injury that plaintiffs failed to show antitrust injury "as a matter of law." The decision in effect holds that a defendant can win summary judgment by filling the record with sufficient evidence hypothetically favorable to its defenses, whatever showing plaintiff makes.

This result merely emphasizes the pernicious effect a "but for" causation rule would have in antitrust jurisprudence. Given the complexity of the marketplace, which is the setting of the antitrust offense, a "but for" causation rule is simply a way to create a "presumption in favor of summary judgment for defendant," a presumption which this Court has recently rejected. *Kodak v. Image Technical Services* (1992) ____ U.S. ____, 112 S.Ct. 2072, 2088, 119 L.Ed.2d 265, 291. For this reason alone, the tort law "but for" causation rule has never had a place in antitrust jurisprudence, and it has no place there today.

V.

INJUNCTIVE RELIEF IS COMPELLED

The Court of Appeals concluded its opinion by affirming the denial of injunctive relief on the same "antitrust injury" grounds" on which it affirmed the dismissal of the damage claims. It then concluded with the curious remark that "[t]his conclusion is buttressed by the fact that all but one of the plaintiffs have gone out of business, and thus, cannot show threatened loss or damage by the defendants' conduct." App. A at 23a.

Obviously, if one plaintiff has still not been driven out of business by defendants' activities, that is both a sufficient and a compelling reason to enjoin those activities. This Court recently emphasized this point:

> "Indeed, the evident import of Congress' reference to '*threatened* loss or damage' is not to constrict the availability of injunctive remedies that have already begun or occurred, but rather to expand their availability against harms that are as yet unrealized. See *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 130, and n.24."

California v. American Stores Co. (1990) 495 U.S. 271, 282 n.8 (original emphasis). Therefore, the court below further erred in denying plaintiffs a chance to try their cases for injunctive relief.

VI.

CONCLUSION

The Seventh Circuit has departed from the principles of antitrust causation long established by this Court and followed by the other circuits. In the place of the venerable "material cause" standard it has imposed a new "but for" causation standard that, in practice, is totally inappropriate for antitrust analysis. The pernicious mischief this new standard will work is amply illustrated by the decision below. In effect, the appellate court winks at a per se violation of an antitrust law forged by Congress to prevent precisely the type of injury that defendants inflicted upon plaintiffs, without so much as a trial on the merits, solely on the ground that defendants can concoct a list of other hypothetical causes for plaintiffs' injury. This Court should grant certiorari to bring the Seventh Circuit into line on the proper standard of antitrust causation.

Respectfully submitted,

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APPENDIX A

No. 92-2212.
United States Court of Appeals, Seventh Circuit.
Argued Dec. 1, 1992.
Decided June 15, 1993.

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORP., SHEPHERD OIL, INC., VIDALIA ETHANOL, LTD., et al., *Plaintiffs-Appellants,*

v.

SHELL OIL COMPANY, MARATHON PETROLEUM COMPANY, AMOCO OIL COMPANY, INC., CHEVRON, U.S.A., INC., ATLANTIC RICHFIELD CO., B.P. AMERICA, EXXON COMPANY, U.S.A. AND MOBIL OIL CORPORATION, *Defendants-Appellees.*

Before CUDAHY and RIPPLE, Circuit Judges, and LAY, Senior Circuit Judge.*

CUDAHY, Circuit Judge. Ethanol producers and gasohol blenders sued a number of oil companies for treble damages and injunctive relief pursuant to §§ 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26 (1988), alleging that the companies violated, *inter alia*, the Gasohol Competition Act of 1980, 15 U.S.C. § 26a (1988). The district court granted summary judgment against the plaintiffs on the ground that they lacked antitrust standing. Because we find that the plaintiffs have failed to show antitrust injury, we affirm.

I.

Ethanol is an alcohol produced from the fermentation of grain, molasses and other agricultural products. When blended with gasoline (generally in a ratio of one part ethanol to nine parts gasoline), the motor fuel gasohol is formed. The plaintiffs, eleven

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*The Honorable Donald P. Lay of the United States Court of Appeals for the Eighth Circuit is sitting by designation.

ethanol manufacturers and/or sellers[1] and two gasohol blenders[2] (collectively, the plaintiffs), brought this action against eight integrated oil companies for treble damages and injunctive relief under §§ 4 and 16 of the Clayton Act.[3] They alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988), § 26a of the Clayton Act, otherwise known as the Gasohol Competition Act of 1980, 15 U.S.C. § 26a (1988), the Illinois Antitrust Law, 740 ILCS 10/1 *et seq.* (1992) (Ill.Rev.Stat. ch. 38 P 60-1 *et seq.* (1991)), and the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* (1992) (Ill.Rev.Stat. ch. 121 1/2 P 261, *et seq.* (1991)). The plaintiffs assert that the defendants, individually and in combination, discriminated against and disparaged ethanol and gasohol to eliminate competition in the motor fuel market. In particular, the plaintiffs allege that the oil companies restricted the purchase and sale of gasohol by their dealers and jobbers, limited the use of their credit instruments in transactions involving gasohol, engaged in an anti-alcohol campaign by labeling their gasoline with signs indicating that the product contains "no alcohol" and, finally, communicated among themselves sensitive competitive information regarding ethanol and gasohol.

The district court held that the plaintiffs did not have standing to sue under § 4 and granted summary judgment for the defendants. 790 F.Supp. 804 (C.D.Ill.1992). The court applied the factors discussed in *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-45, 103 S.Ct. 897, 908-12, 74 L.Ed.2d 723 (1983), and found that the injuries which the plaintiffs alleged, namely, lost profits resulting

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[1]Namely, Greater Rockford Energy and Technology Corporation, Shepherd Oil, Inc., Vidalia Ethanol, Ltd., Alpebo, Inc., Shreveport Ethanol, Inc., Lakefield Ethanol, Inc., A.E. Montana, Inc., CEPO, Inc., High Plains Corp. and Texas Ethanol Producers. Wurster Oil Company is a gasohol blender, but has sued in its capacity as an ethanol seller.

[2]Cajun Energy, Inc. and Public Terminals, Inc.

[3]The State of Illinois intervened as a plaintiff before the district court, but its claims were dismissed without prejudice. The dismissal is not challenged in this appeal.

in the plaintiffs' business failures,[4] were indirect, derivative, speculative and duplicative given that the plaintiffs were not competitors or consumers in the market allegedly restrained and that there was an abundance of other causes for the plaintiffs' economic troubles.[5]

II.

Summary judgment is warranted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). To forestall a motion for summary judgment, a non-movant plaintiff must present sufficient evidence to show the existence of each element of its case on which it will bear the burden of proof at trial. *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 48-49 (7th Cir.1992). Of course, we review the grant of summary judgment de novo, evaluating the evidence in the light most favorable to the non-moving party. *Matsushita*, 475 U.S. at 587, 106 S.Ct. at 1356. We can affirm the grant of summary judgment on any ground, even one not relied on by the district court, if the record fairly supports that justification and it has not been waived by the appellee. *Martinez v. United Auto., etc., Local 1373*, 772 F.2d 348, 353 (7th Cir.1985).

Section 4 of the Clayton Act provides

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sus-

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[4]All of the plaintiffs, with the exception of High Plains Corp., have since gone out of business.

[5]Having dismissed the federal claims for lack of antitrust standing, the district court dismissed the pendent claims under Illinois law for lack of jurisdiction. By failing to challenge the dismissal, the plaintiffs effectively concede that if summary judgment on the federal claims was appropriate, the dismissal of the pendent state claims was also appropriate.

> tained, and the cost of the suit, including a reasonable attorney's fee.

Although the language of this provision could be read to provide a treble-damage remedy to anyone who was injured in some way by an antitrust violation, the provision has not been construed so expansively. *Associated General Contractors*, 459 U.S. at 535, 103 S.Ct. at 907 (" 'It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.' " (quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (1982))). Given the potential scope of antitrust violations and the availability of treble damages, an over-broad reading of § 4 could result in "overdeterrence," imposing ruinous costs on antitrust defendants, severely burdening the judicial system and possibly chilling economically efficient competitive behavior. *See Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360; William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan.L.Rev. 1445, 1453 (1985). Accordingly, the Supreme Court has placed several limitations on the scope of antitrust liability. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Court held that § 4 plaintiffs must prove "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. 477, 487-88, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original). And in *Associated General Contractors*, it applied traditional common-law tort principles to read a proximate cause element into § 4 actions. Thus, the Court held that a plaintiff does not have standing to sue under § 4 if its injuries were indirect and speculative.[6]

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[6]The standing requirement similarly has been applied to treble-damage actions under RICO. *See, e.g., Holmes v. Securities Investor Protection Corp.*, ____ U.S. ____, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Illinois v. Life of Mid-America Ins. Co.*, 805 F.2d 763 (7th Cir. 1986).

A great deal of confusion has surrounded these two limitations. *See Local Beauty Supply, Inc. v. Lamaur Inc.*, 787 F.2d 1197, 1201 (7th Cir.1986) (noting confusion between antitrust injury and antitrust standing doctrines, and citing cases); Phillip Areeda & Herbert Hovencamp, Antitrust Law ¶ 334.3 (Supp.1991). Lack of standing and antitrust injury often have been invoked interchangeably against a plaintiff even though each concept involves a distinct element of the § 4 action. The elements of the § 4 action correspond to the components of a common-law action in tort. See *Associated General Contractors*, 459 U.S. at 533, 103 S.Ct. at 906 ("Congress simply assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied to comparable litigation."). An action in tort has four elements: (1) a duty recognized by law requiring the defendant to conform to a standard of conduct; (2) a breach of the duty; (3) damage or injury to a legally recognized interest; and (4) causation, including both causation in fact, or "but for" cause, and legal, or proximate cause. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984) [hereinafter Prosser & Keeton]. Correspondingly, the elements a plaintiff must satisfy to bring a § 4 action for treble damages are: (1) a duty recognized by the antitrust laws; (2) a violation of the antitrust laws; (3) injury to an interest protected by the antitrust laws and attributable to the antitrust violation — that is, *antitrust injury*; and (4) a direct link between the antitrust violation and the antitrust injury, that is to say, *standing*.[7]

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[7]"Standing" may be broadly construed to involve all the elements of the cause of action. That is, a plaintiff may not have "standing" unless he can satisfy each requirement of the § 4 action — antitrust violation, antitrust injury and proximate cause. There is some logic to this interpretation, for as we shall discuss, *infra*, "standing" limits access to the cause of action to those properly suited to vindicate the violation. A person cannot be the most effective plaintiff if he cannot satisfy all of the elements of § 4. For purposes of clarity and in accord with what seems to be the approach of this circuit, see *Local Beauty Supply*, 787 F.2d at 1201; *In re Indus. Gas Antitrust Litig. (Bicahn)*, 681 F.2d 514, 519-20 (7th Cir.1982), *cert. denied*, 460 U.S. 1016, 103 S.Ct. 1261, 75 L.Ed.2d 487 (1983), and of the commentators, *see, e.g.*, Page, *supra*, at 1484-85,

Both antitrust injury and standing are, of course, necessary to proceed under § 4. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 nn.5 & 6, 107 S.Ct. 484, 489 nn.5 & 6, 93 L.Ed.2d 427 (1986); *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1377 (7th Cir.1987). Antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit — those "injured . . . by anything forbidden in the antitrust laws." *See In re Indus. Gas Antitrust Litig.*, 681 F.2d at 516; Page, *supra*, at 1484. In establishing antitrust injury, courts must first delineate the type of interests protected by the antitrust laws, *see Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419 (7th Cir.1989); *Local Beauty Supply*, 787 F.2d at 1202, and second, must determine whether the violation was the cause-in-fact of the injury: that "but for" the violation, the injury would not have occurred, *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081, 1161 (7th Cir.), *cert. denied*, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983); *In re Indus. Gas Antitrust Litig.*, 681 F.2d at 515; Page, *supra* at 1462-63.

Standing, on the other hand, examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction. *See Cargill*, 479 U.S. at 111 n.6, 107 S.Ct. at 490 n.6; *In re Indus. Gas Antitrust Litig.*, 681 F.2d at 516, 519; Page, *supra*, at 1484. Antitrust standing, however, is primarily a matter of legal policy, namely: "[W]hether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred." Prosser & Keeton, supra, § 42, at 273; cf. Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 Yale L.J. 809 (1977) (proposing policy-oriented approach to standing analysis). In *Associated General Contractors*, the Court identified factors we must consider in deciding whether a plaintiff has

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we prefer, however, to treat antitrust injury and standing separately. We will, therefore, refer to standing only when discussing the element of proximate cause. Of course, this is merely a matter of semantics and the essential elements of the § 4 action remain the same under either approach.

standing, such as "the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed." *Cargill*, 479 U.S. at 111 n.6, 107 S.Ct. at 490 n.6 (citing *Associated General Contractors*, 459 U.S. at 544-45, 103 S.Ct. at 912); *Southwest Suburban Board of Realtors*, 830 F.2d at 1377. Ultimately, standing involves a case-by-case analysis of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Associated General Contractors*, 459 U.S. at 535, 103 S.Ct. at 907.

A. *Violation of the Antitrust Laws*

1. *The Sherman Act Claims*

The plaintiffs allege that the defendants violated §§ 1 and 2 of the Sherman Act and the Gasohol Competition Act (section 26a of the Clayton Act). The plaintiffs voluntarily withdrew their monopolization claim under § 2 of the Sherman Act, and the district court dismissed that claim with prejudice. Plaintiffs do not attempt to resuscitate the claim here. With respect to the § 1 claims, a plaintiff, to show a violation, must establish a contract, conspiracy or combination intended to restrain competition and which actually has an anticompetitive effect. *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 553-54 (7th Cir.1980); *City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1365 (9th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 305, 121 L.Ed.2d 228 (1992). To show a conspiracy to restrain trade, a plaintiff must proffer evidence, either direct or circumstantial, " 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1356 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 1470, 79 L.Ed.2d 775 (1984)); *Reserve Supply*, 971 F.2d at 48-49.

Plaintiffs have failed to show a § 1 violation because they have not presented evidence tending to show an agreement to restrain trade. Indeed, the conspiracy claim is belied by the fact that four of the eight defendants — Amoco, Arco, Chevron and Mobil — sold alcohol-blended gasoline during the time of the alleged

conspiracy to restrain trade in gasohol.[8] The only evidence suggesting concerted action among the defendants is their common membership in organizations such as the American Society for Testing and Materials (ASTM), a private group which sets standards and specifications for, among other things, motor fuels. The defendants also belong to the American Petroleum Institute (API), a trade association representing all sectors of the domestic oil industry. The plaintiffs allege that the defendants combined in these organizations to restrain trade (1) by delaying issue of an ASTM motor fuel specification that included gasohol and (2) by lobbying governmental authorities through the API to discourage the marketing and acceptance of gasohol. Neither of these claims, however, amounts to a § 1 violation.

First, the failure of a private, standard-setting body to certify a product is not, by itself, a violation of § 1. In *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir.1988), a manufacturer of "sucker rods" — a steel rod used to pump oil from wells — argued that the API's delay in certifying its innovative product was an illegal restraint of trade in violation of § 1. The Fifth Circuit disagreed and affirmed summary judgment against the plaintiff. It held that "a trade association that evaluates products and issues opinions, without constraining others to follow its recommendations, does not *per se* violate section 1, when for whatever reason, it fails to evaluate a product favorably to the manufacturer." *Id.* at 292; see also *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 399-400 (7th Cir.1989). The Fifth Circuit then found that the delay in certification did not violate § 1 under a rule-of- reason. First, the plaintiff failed to show a conspiracy, for "a trade association is not by its nature a 'walking conspiracy.' " *Id.* at 293-94; *Wilk v. American Medical Ass'n*, 895 F.2d 352, 374 (7th Cir.), *cert. denied*, 498 U.S. 982, 111 S.Ct. 513, 112 L.Ed.2d 524 (1990); *see also Moore v. Boating Indus. Ass'n*, 819 F.2d 693, 712 (7th Cir.), *cert. denied*, 484 U.S. 854, 108 S.Ct. 160, 98 L.Ed.2d 115 (1987) (membership in trade association alone not sufficient

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[8]Chevron also held an ownership interest in an ethanol production plant at the time it was allegedly conspiring against the sale of gasohol.

evidence of agreement to restrain trade). Second, there was no evidence of an intent to restrain trade, the court held, noting that the API followed its normal certification procedures. Finally, the court found no evidence of an anticompetitive effect because the certification, although influential, was not required to compete in the market. Reliance by oil pump buyers on the certification was voluntary, and the record indicated that the plaintiff had no problem selling its product without the API's certification.

The plaintiffs' § 1 claim fails here for analogous reasons. As we have noted, there is no evidence of concerted action. In addition, the plaintiffs have not proffered evidence of an unlawful purpose. The ASTM did not stray from its normal procedures. Indeed, the plaintiffs concede as much, but argue that "the defendants did not even adopt an emergency specification for gasohol, although ASTM procedures plainly provided that emergency specifications could be adopted to fill a pressing need while a proposal went through the normal ASTM standards-writing process and ballots." Pls.' and Intervs.' Mem. in Opp'n to Defs.' Mots. for Summ.J. at 62. The failure to take emergency steps to specify gasohol and proceeding through the normal specification process, however, is not evidence of an unlawful purpose. Finally, there is no evidence of an anticompetitive effect. The record indicates that in the period 1978-1987, during which the defendants, acting through the ASTM, allegedly restrained trade by not issuing a gasohol specification, ethanol fuel sales increased continuously from 20 million gallons per year to 825 million gallons per year — a 4000 percent increase. It would be difficult to show an anticompetitive effect on ethanol sales in the face of this increase.

Moreover, the API's lobbying efforts do not support a § 1 claim. Under the *Noerr-Pennington* doctrine, lobbying that would arguably restrain trade is protected political activity and does not violate the antitrust laws. *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). Although there is an exception from First Amendment protection for "sham lobbying," *Noerr*, 365 U.S. at 144, 81 S.Ct. at 533, the Supreme Court has recently explained that "a sham situation involves a defendant

whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result but does so *through improper means.*" *City of Columbia v. Omni Outdoor Advertising, Inc.*, ____ U.S. ____, ____, 111 S.Ct. 1344, 1354, 113 L.Ed.2d 382 (1991) (citations and quotation marks omitted) (emphasis in original). Here, the plaintiffs do not allege that the lobbying efforts were not intended to get legislative results. In fact, the plaintiffs assert that the efforts achieved their desired legislative effect. Hence, these activities are protected and do not violate the Sherman Act.

2. *The Gasohol Competition Act Claims*

The only remaining basis for a violation of the antitrust laws lies in the claims under the Gasohol Competition Act, which we duplicate in the margin.[9] The plaintiffs first assert that the oil

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[9]The Gasohol Competition Act of 1980 provides in full:

(a) Limitations on the use of credit instruments, sales, resales, and transfers

Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that —

(1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer or gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or

(2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States.

(b) Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities

(1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in

companies engaged in an "anti-alcohol" campaign (1) by posting signs at their stations announcing that their products contain no alcohol, thus implying that there is something wrong with gasohol, and (2) by not including on such signs recognition of gasohol's quality. Initially, we doubt that the signs unreasonably discriminate against gasohol. In *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d at 400, for example, we held that an ophthalmological academy did not commit an antitrust

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subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit.

(2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available.

(3) Nothing in this section shall —

(A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person;

(B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel;

(C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or

(D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.

(c) Definition

As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States and any insular possession or other place under the jurisdiction of the United States.

violation by labeling a particular surgery "experimental." We found that the speech did not "restrain trade" but simply affected demand for the surgery by informing patients of its nature. We held that the appropriate remedy was not antitrust litigation but "more speech."

Even assuming that the signs here discriminate against gasohol, subsection (b)(3)(A) of the Act permits petroleum companies to label pumps dispensing gasohol to distinguish that product from other products manufactured and distributed by the companies. In addition, subsection (b)(3)(B) authorizes petroleum companies to issue disclaimers of liability for any damage attributable to gasohol. The apparent intent of these provisions is to permit oil companies to distinguish petroleum products from gasohol and to disavow any adverse consequences from gasohol use. Signs stating "No alcohol" are not qualitatively different from those which the petroleum companies seem to be free under the Act to post—signs providing, in effect, that a product contains alcohol[10] and that the petroleum company did not manufacture the product and is not responsible for damage it may cause. Indeed, the signs posted by the defendants seem less likely to convey the message that gasohol is an inferior motor fuel than do signs which seem to be specifically permitted under the Act. With respect to the defendants' failure to include positive information about gasohol in its signs, subsection (b)(3)(C) explicitly provides that companies are not required to provide advertising support for gasohol.

The plaintiffs next argue that the defendants have refused to permit the use of existing tanks and pumps for storage and dispensing of gasohol and have done the same with respect to the storage and blending of ethanol. The plaintiffs maintain that this refusal is an unreasonable limitation on the sale of gasohol. They direct us to language in the House and Senate Reports on the gasohol legislation defining what an unreasonable limitation on the sale of gasohol includes. The House Report states

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[10]As we discuss, *infra*, a number of states have enacted laws requiring dealers to post "gasohol" or "contains alcohol" labels on their gasohol pumps.

> Paragraph [(a)(2)] also prohibits unreasonable limitations on the sale of gasohol and other synthetic fuels. The phrase "unreasonably limits" was used to cover obstacles to the marketing of gasohol that were not necessarily discriminatory. For example, if an oil company forbids the use of its pumps and tanks for dispensing any noncompany product, gasohol is not singled out, but its sale is impeded. This limitation, although nondiscriminatory, should be prevented and will be reached under paragraph [(a)(2)] of this act.

H.R.Rep. No. 1464, 96th Cong., 2d Sess. 6 (1980), *reprinted in 1980* U.S.C.C.A.N. 5393, 5397-98; *accord* S.Rep. No. 868, 96th Cong., 2d Sess., at 10-11 (1980) (same). The plaintiffs also recognize, and the defendants rely upon, subsection (b)(3)(D), which provides that the Act does not "require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel." The plaintiffs, however, point to the word "additional" and argue that Congress only meant to relieve franchisors from the obligation of installing new equipment for gasohol distribution. Mindful that any exemptions from the antitrust laws are to be construed narrowly, "with beady eyes and green eyeshades," *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 672 (7th Cir.), cert. denied, ____ U.S. ____, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992), we agree with the plaintiffs that this is the only interpretation consistent with the Act's language and intent. In fact, the House and Senate Reports specifically state that the exemption from furnishing additional facilities does not permit franchisors to prohibit dealers from using existing tanks and pumps for the sale of gasohol. 1980 U.S.C.C.A.N. at 5398; S.Rep. No. 868 at 11. In addition, the plaintiffs have asserted that the defendants limited the use of credit instruments in the sale of gasohol. This is in direct violation of subsection (a)(1) of the Act, which makes it unlawful to limit the use of credit instruments in any gasohol transaction. Viewing the record in the light most favorable to the plaintiffs, as we must on a motion for summary judgment, we find that there is a genuine issue of fact as to whether the defendants violated the Gasohol Act. Thus, for purposes of summary judgment, we assume the existence of a

violation, and continue our review of the § 4 requirements to determine whether summary judgment against the plaintiffs was appropriate.

B. *Antitrust Injury*

In *Brunswick*, the Supreme Court held that to maintain a § 4 action for treble damages, a plaintiff must show "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." 429 U.S. at 489, 97 S.Ct. at 697. We will analyze both of these requirements in turn.

1. *Type of Injury*

In determining whether the injury alleged is the type the antitrust laws were intended to prevent, the Supreme Court has directed us to look at " 'the type of loss that the claimed violations ... would be likely to cause,' " *Id.* at 489, 97 S.Ct. at 697 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125, 89 S.Ct. 1562, 1577, 23 L.Ed.2d 129 (1969)), or, in other words, to consider whether the injuries "fall squarely within the area of congressional concern." *McCready*, 457 U.S. at 485, 102 S.Ct. at 2551. Thus, when defining the scope of antitrust injury for a violation of the Gasohol Competition Act, it is the purpose of that legislation, and the interests it seeks to protect, which is controlling.[11] Upon reviewing the purposes of the

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[11]This comports with the approach taken by courts in defining antitrust injury for § 4 suits predicated upon a violation of the Robinson-Patman Act. These courts have recognized that the interests Congress sought to protect in enacting the Sherman Act and the Robinson-Patman Act "do not mirror one another," *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1540 n. 17 (3d Cir.1990); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 450-51, 98 S.Ct. 2864, 2880, 57 L.Ed.2d 854 (1978) (noting distinction and potential tension between Sherman Act and Robinson-Patman Act). Thus, courts have relied on the purposes of the Robinson-Patman Act to determine whether the plaintiffs have satisfied the antitrust injury requirement for a Robinson-Patman violation. *See, e.g., J.F. Feeser*, 909 F.2d at 1533-35, 1539-41 & n. 17 (secondary-line plaintiff need only show injury to

Gasohol Act, we believe that the plaintiffs have alleged the type of injury the Act was intended to avert.

The basic intent of the Gasohol Act, as gleaned from the House and Senate Reports, is "simply to promote generally the sale of gasohol and other synthetic fuels and not to affect the sale of specific brands of those products." 1980 U.S.C.C.A.N. at 5395. The House Report provides

> In recent months, there has been increasing recognition of the need for rapid and effective development of alternative energy sources to offset this nation's dependence on the ever-dwindling supply of foreign and domestic oil. One program that will help to decrease America's reliance on foreign energy sources is the production and use of gasohol. Should the consuming public be denied the opportunity to purchase such alternative fuels, public and private efforts to encourage alternative fuel development will be frustrated.

Id.; accord S.Rep. No. 868 at 5. The second, more specific purpose of the Act is to "ensure that retailers and distributors of

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competitor to satisfy competitive injury requirement, and correspondingly, the antitrust injury requirement; injury to consumers unnecessary); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 n.6, 1426-28 (11th Cir.1990) (same); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir.1987) (noting that "in order for a plaintiff to prove competitive injury under Robinson-Patman, he need only show that a substantial price discrimination existed as between himself and his competitors over a period of time."), *aff'd on other grounds*, 496 U.S. 543, 110 S.Ct. 2535, 110 L.Ed.2d 492 (1990); Areeda & Hovencamp, *supra*, ¶ 340.5 (citing with approval finding of antitrust injury in favor of injured competitor in *Hasbrouck*). Indeed, even the courts which have held that interpretation of "competitive injury" under the Robinson-Patman Act to be analogous to that applied under the Sherman Act have done so by reviewing the intent and legislative history of the Robinson-Patman Act, concluding only then that the two acts have similar purposes. *See, e.g., Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1138-39, 1143-48 (D.C.Cir.1988) (reviewing purpose of Robinson-Patman Act and concluding that, as in the case of the Sherman Act, absence of consumer injury is evidence in rebuttal of showing of competitive injury).

synthetic fuels, including gasohol, will not be discriminated against by their suppliers and/or owners of their retail stations because of sales of synthetic fuels." 1980 U.S.C.C.A.N. at 5393; *accord* S.Rep. No. 868 at 2 ("Moreover, the committee wants to insure that dealers will be permitted to market newly developed alternative fuels when those fuels reach gasohol's level of quality and acceptability."). Therefore, the congressional purpose in enacting the Gasohol Competition Act transcends the short-term economic interests of consumers. The Gasohol Act was intended to promote the development of alternative motor fuels. It did this not only by protecting *competition* generally, but went further by protecting, in a limited way, *competitors* — those who develop, produce and market alternative motor fuels. Unlike the Sherman Act, the Gasohol Competition Act imposes affirmative obligations on companies to promote the growth of gasohol, such as requiring companies to permit dealers to use company tanks and pumps for the sale of gasohol and to extend credit for gasohol purchases on terms equal to those offered for non-gasohol purchases.

The defendants argue that the interests protected by the Act are solely those of the dealers and distributors, and thus maintain that only dealers and distributors may suffer antitrust injury from a violation of the Gasohol Act. They rely on *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, No. CV-S-90-076-PMP (D.Nev. Dec. 27, 1991), where the court held that two marketers of gasohol did not have standing to sue under the Gasohol Act because the Act "confers standing only upon franchisees or those who have directly acquired petroleum products from the supplier accused of the discriminatory or limiting behavior." *Id.* at 4. But *Rebel Oil* cites only those portions of the House Report that refer to franchisees and distributors. It is true that the Act was enacted to protect dealers and distributors, but that was not the only, or even the most central, purpose of the Act.

In that connection, the Senate Report, in summarizing the purposes of the Act, states: "In order to relieve our tenuous energy supply, the committee believes that domestically available alternatives to conventional oil and gas resources are necessary. It is to this effort that [the Gasohol Competition Act] is ad-

dressed." As this and other provisions demonstrate, the protection of dealers is simply a means to the end of promoting the sale of gasohol and other synthetic motor fuels. *See, e.g.*, 1980 U.S.C.C.A.N. at 5393 (the Act "will promote the sale of gasohol and other synthetic motor fuels by ensuring that franchisees of existing major oil companies can utilize the company's credit arrangements and marketing facilities to promote these alternative sources of energy and to preclude unreasonable discrimination against dealers desiring to market these synthetic fuels."). Confining the interests protected by the Act to those of dealers and consumers so that only they are capable of suffering antitrust injury, is belied by the overall purposes of the Act. Indeed, we believe that the interests protected by the Act extend beyond the simple sale and marketing of gasohol — and therefore the interests of gasohol blenders and dealers — and include the development and production of alcohol-blended motor fuels. *Id.* at 5395; *see also* S.Rep. No. 868 at 1 (emphasizing "urgent need for rapid and effective development of viable alternative fuels to offset . . . dependence on . . . foreign oil").[12] Hence, the interests of ethanol manufacturers and sellers, integral to the promotion and development of gasohol, "fall squarely within the area of congressional concern." *McCready*, 457 U.S. at 485, 102 S.Ct. at 2551. Accordingly, we believe that these blenders, manufacturers and sellers all may suffer the type of injury that Congress meant to preclude.[13]

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[12]Although these purposes may transcend to a degree the accustomed, consumer-oriented purposes of the "antitrust" laws, we do not think that Congress's concern for fostering new products and new competitors in this context in any way marks the Gasohol Act as something other than an antitrust law, or the injury resulting from its violation as something other than an antitrust injury.

[13]The mere showing that gasohol blenders and ethanol manufacturers and sellers may suffer the type of injury protected against by the Gasohol Act does not mean that these categories of interests necessarily have standing to sue for a violation of the Act. As noted, antitrust injury and antitrust standing involve two separate inquiries. The crux of the standing analysis is whether the plaintiff is the proper party to vindicate the antitrust interest.

2. *"But for" Cause*

To satisfy the antitrust injury requirement, a § 4 plaintiff must show that its injury "flows from that which makes defendants' acts unlawful," *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697 — that "but for" the alleged violation, the injuries would not have occurred. *MCI*, 708 F.2d at 1161; Areeda & Hovencamp, *supra*, ¶ 334.3a; Page, *supra*, at 1461. An antitrust violation need not be the sole cause of the alleged injuries, but the plaintiff must establish, with a fair degree of certainty, that the violation was a material element of, and substantial factor in producing, the injury. *See Zenith Radio Corp.*, 395 U.S. at 114 n.9, 89 S.Ct. at 1571 n.9; *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467, 474-75 (7th Cir.1980), *cert. denied*, 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981). The proof required to show causation of damages is greater than that required to prove the amount of damages, where a plaintiff is afforded more latitude due to the "vagaries of the marketplace." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566, 101 S.Ct. 1923, 1929, 68 L.Ed.2d 442 (1981); *MCI*, 708 F.2d at 1168.[14]

In *Argus Inc. v. Eastman Kodak Co.*, 801 F.2d 38, 44 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088, 107 S.Ct. 1295, 94 L.Ed.2d 151 (1987), for example, a wholesaler of photography equipment and a licensor of camera equipment sued Kodak for damages resulting from Kodak's Sherman Act violation in signing a confidentiality agreement with the developer of a new and improved flash unit. The Second Circuit affirmed the grant of summary judgment against the plaintiff on the ground that the plaintiffs failed to show that, but for the antitrust violation, they would not have suffered the losses they alleged. The plaintiffs had been suffering economic hardship before the antitrust violation, had recently lost the supplier of their lead line of camera and had lacked a supplier for a projected leading product. *See also Southwestern Sheet Metal Works, Inc. v. Semco Mfg., Inc.*, 788 F.2d 1144, 1145-47 (5th Cir.1986) (holding that plaintiff failed

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[14]In ascertaining the amount of damages, the plaintiff nonetheless must be able to trace its damages to the injury which was in fact caused by the violation. *MCI*, 708 F.2d at 1168.

to show, given the existence of other competitive bidders, that but for the violation granting a competitor a bidding advantage, plaintiff would have been awarded the projects at issue), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1370, 94 L.Ed.2d 686 (1987); *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 268-72 (D.C.Cir.1981) (holding that mail-order prescription service failed to show that, but for the American Pharmaceutical Association's attempt to restrain mail-order competition, it would not have undertaken the expense of identifying forged prescriptions), cert. denied, 455 U.S. 928, 102 S.Ct. 1293, 71 L.Ed.2d 472 (1982).

Defendants identify numerous intervening economic and market factors which they argue may have been the actual cause of the plaintiffs' injuries. They contend that the alleged antitrust violations played an insignificant role (or none at all) in the plaintiffs' economic woes, and that therefore no reasonable trier of fact could find that the violation *caused* the plaintiffs' injuries. We agree and find that as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries. Hence, the plaintiffs did not suffer antitrust injury.

There are many alternative explanations for the injuries which the plaintiffs allege. First, many automobile owner's manuals warned consumers against the use of motor fuels containing alcohol. For example, the owner's manual for the 1986 Chrysler LeBaron GTS stated that "Chrysler does not recommend using fuels containing alcohol because some gasoline/alcohol blends may degrade the starting, driveability and fuel efficiency of your vehicle." Numerous other owner's manuals of record suggested precautions owners should take when using gasoline containing alcohol. These precautions involve, among other things, verifying the amount and type of alcohol blended with the gasoline.[15] These

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[15]The record contains owner's manuals from the 1991 Honda Accord, 1990 Mitsubishi Eclipse, 1986 Nissan Stanza Wagon, 1986 Porsche Audi, 1984 Saab 900, 1986 Subaru, 1984 Toyota Tercel, 1984 Volkswagen Rabbit, 1987 AMC, 1989 Eagle Summit, 1989 Dodge Ram,

cautionary counsels likely dissuaded some owners from using gasohol.

Second, reports in the media criticized alcohol-blended motor fuels and discouraged the use of gasohol by consumers. In particular, the April, 1987, issue of *Consumer Reports* suggested that consumers "avoid gasoline/alcohol blends altogether — if you can."

Third, a number of state laws hurt gasohol sales by requiring retailers to post pump labels disclosing that a motor fuel contained alcohol. A Louisiana law adopted in 1986 was particularly damaging to gasohol sales. This labeling law required a black and gold label with three-inch letters stating that the fuel was "gasohol" or "contains ethanol." After enactment of the law, gasohol sales in Louisiana — where seven of the thirteen plaintiffs operated — "dropped anywhere from approximately 66 to 72 percent" according to Robert Love, the general manager of one of the plaintiffs, Cajun Energy. Representatives of other plaintiff companies also acknowledged the negative effect of the labeling law, reflected in reduced sales and lost clients. One of the plaintiffs' experts, J.B. Smith, for example, acknowledged that the labeling law "killed ethanol in the marketplace." Mr. Smith further maintained that a Florida labeling law reduced sales by 33 percent.

Fourth, states that had exempted gasohol in whole or in part from state fuel taxes eliminated or reduced those exemptions. Since 1986, twenty-seven of the thirty-three states that had enacted exemptions eliminated or reduced them.[16] This increase

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1985 Ford Tempo, 1984 Buick Regal, 1986 Buick Riviera and 1986 Chevrolet.

[16]The states exempting gasohol in whole or in part from state fuel taxes in 1985 were Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. Of these, only Alaska, Connecticut, Hawaii, Idaho, Washington and Wyoming have not since elimi-

in taxes made gasohol more expensive, effectively reducing the price gasohol marketers would pay for gasohol and gasohol blenders would pay for ethanol.

Fifth, the drop in gasoline prices in 1986 caused a corresponding drop in ethanol prices which inflicted serious financial consequences on the plaintiffs. Wendall Harris, president of plaintiff CEPO, summarized the result of the drop in gas prices:

> The past several months have witnessed a drastic decline in gasoline prices which, in turn, leads to a corresponding decline in ethanol prices. In January [1986], the price was $1.56, by March it fell to $1.20, and by May it sank to $.97. Our company has undergone serious financial loss for the past several months due, in substantial part, to those price declines.

Representatives of other plaintiff companies echoed these views about the effect of the decline in gas prices on gasohol and ethanol prices.

Sixth, the United States Department of Agriculture in 1986 instituted a program to subsidize grain-based ethanol producers. The subsidy effectively reduced the raw material costs of grain-based ethanol producers by forty percent by giving them one free bushel of grain for every two and one-half used. Most of the present plaintiffs could not take advantage of the subsidy because they relied on other, non-grain feedstocks, such as molasses. Two of the current plaintiffs — Alpebo and Shepherd — being molasses-based producers, sued the Secretary of Agriculture in an attempt to defeat the subsidy, arguing that the subsidy would "give grain-based producers a competitive advantage over plaintiffs, which they will use to drive the price of ethanol down to a point at which plaintiffs are unable to compete." Richard Dodd, vice-president of plaintiff Shepherd Oil, related that the subsidy would permit its grain-based competitors to drive down prices to a point where Shepherd would not have the financial strength to compete very long. He noted that this was true especially given

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nated or reduced the exemption. Only Missouri and South Carolina have begun to exempt gasohol since 1985 without any subsequent reduction or elimination of the exemption.

that the price of Shepherd's feedstock, molasses, had nearly doubled in one year. Similarly, Mr. Harris of CEPO candidly stated that unless CEPO was eligible for the same or a similar subsidy, "I strongly doubt whether CEPO would stay in the ethanol market for any length of time. We cannot sell into a market at prices which guarantee losses."

Seventh, in 1987 Louisiana terminated its state subsidy providing $1.40 for each gallon of ethanol produced and sold in Louisiana. Four of the current plaintiffs — Alpebo, Shepherd, Shreveport and Vidalia — were ethanol producers in Louisiana,[17] and were seriously hurt by the loss of the subsidy. Instead of collecting the price of a gallon of ethanol plus the subsidy of $1.40 for every gallon of ethanol produced, Louisiana ethanol producers were suddenly collecting only the price per gallon the market would allow. Matthew Kling, former director of marketing and commodities for Shepherd Oil, conceded that "Shepherd was not a profitable business because its ethanol production was reliant on state subsidies. It is simple economics to determine that, if ethanol is priced competitive with the price of gasoline, it simply cannot be sold at a consistent profit by small producers without a state subsidy." Representatives from other plaintiffs also acknowledged that once the subsidy stopped, the ethanol industry in Louisiana all but shut down.

Finally, the plaintiffs conceded that they did not enjoy sufficient economies of scale to compete effectively against larger, grain-based ethanol producers, like Archer Daniels Midland (ADM), a midwestern grain-based producer with approximately 60 percent of the U.S. ethanol market.[18] Kling testified that the large midwestern ethanol producers were able to achieve economies of scale, were more reliable and could compete more effectively due to their direct rail access, location near the grain supply and ability to sell some of their by-products. Representatives of High

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[17]Three other plaintiffs — Wurster, Cajun Energy and Public Terminals — were Louisiana-based wholesale marketers of ethanol and gasohol.

[18]In 1985, eight grain-based ethanol producers controlled approximately 90 percent of all ethanol production in the United States.

Plains, Greater Rockford, Lakefield Ethanol and Shepherd recognized that ADM had significant economies of scale, and was able to produce more ethanol, of better quality and at a lower price per gallon than any of the plaintiffs.

Standing alone one of these alternative causes of the plaintiffs' injuries might be insufficient to put causation-in-fact in question. Taken together, however, the plaintiffs have failed to show with a fair degree of certainty that "but for" the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain. Consequently, as a matter of law the plaintiffs have failed to show antitrust injury, and summary judgment was, therefore, appropriate.

III.

Because a showing of both antitrust injury and antitrust standing are necessary to proceed under § 4, the plaintiffs' inability to show antitrust injury is a sufficient basis for dismissing their case; we need not address the other issues raised on appeal. The lack of antitrust injury, moreover, is fatal to their claim for injunctive relief under s 16 of the Clayton Act. *See Cargill*, 479 U.S. at 113, 107 S.Ct. at 491. This conclusion is buttressed by the fact that all but one of the plaintiffs have gone out of business, and thus, cannot show threatened loss or damage by the defendants' conduct. Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 2, 1993

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DONALD P. LAY, Senior Circuit Judge*

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORPORATION, SHEPHERD OIL, INCORPORATED, VIDALIA ETHANOL, LIMITED, et al,

Plaintiffs-Appellants,

No. 92-2212

v.

SHELL OIL COMPANY, MARATHON PETROLEUM COMPANY, AMOCO OIL COMPANY, INCORPORATED et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division.

No. 90 C 3119
Richard Mills, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed in the above-entitled cause by the appellants on July 29, 1993 and the response thereto, no active member** of the court requested a vote thereon and all of the judges on the original panel voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing *en banc* be, and the same is hereby, DENIED.

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* The Honorable Donald P. Lay, Senior Circuit Judge of the Eighth Circuit, is sitting by designation.

** Circuit Judges Walter J. Cummings and John L. Coffey did not participate in the consideration of this petition for rehearing.

APPENDIX B

No. 90-3119.
United States District Court
C.D. Illinois, Springfield Division.
April 24, 1992.

GREATER ROCKFORD ENERGY AND TECHNOLOGY CORP., SHEPHERD OIL INC., VIDALIA ETHANOL, LTD., ALPEBO, INC., SHREVEPORT ETHANOL, INC., LAKEFIELD ETHANOL, INC., A.E. MONTANA, INC., CEPO, INC., TEXAS ETHANOL PRODUCERS, WURSTER OIL CO., HIGH PLAINS CORPORATION, CAJUN ENERGY, INC., PUBLIC TERMINALS, INC., and PEOPLE OF THE STATE OF ILLINOIS,

Plaintiffs,

v.

SHELL OIL COMPANY, MARATHON PETROLEUM COMPANY, AMOCO OIL COMPANY, CHEVRON, U.S.A., INC., ATLANTIC RICHFIELD CO., B.P. AMERICA, CITGO PETROLEUM CORP., DIAMOND SHAMROCK R & M, INC., EXXON COMPANY USA, MOBIL CORPORATION and SINCLAIR OIL CORP.,

Defendants.

OPINION

RICHARD MILLS, District Judge:

The arcane mysteries of antitrust standing.

And — like all legal concepts—there is a chameleon quality to this principle.

Antitrust law might be summarized as a great, albeit maddeningly imprecise, panacea of the anticompetitive ailments of free enterprise. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. . . ." National Soc. of Professional Engineers v. United States, 435 U.S. 679, 687-688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978) (footnotes omitted).

While the Supreme Court has stated that "it is virtually impossible to announce a black-letter rule that will dictate the result in every case," the Supreme Court has identified the relevant factors to be considered. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 536, 103 S.Ct. 897, 908-911, 74 L.Ed.2d 723 (1983).

This matter is before the Court on a joint summary judgment motion on behalf of all Defendants based on Plaintiffs' alleged lack of antitrust injury and standing.

The bottom line: Allowed. Case dismissed.

I. BACKGROUND

Parties

More than 70 lawyers have now appeared in this case. Over 750 pleadings have been filed producing a case file which, if placed in a single stack, would exceed twelve feet in height.

Since this case presents a classic example of the saying "you can't tell the players without a program," we start with a review of that "program." Plaintiffs and Plaintiff-Intervenors (hereafter referred to collectively as "Plaintiffs") fall into three basic groups: ethanol producers, gasohol blenders, and the State of Illinois.

Plaintiffs Greater Rockford Energy and Technology Corporation, Shepherd Oil, Inc., Vidalia Ethanol, Ltd., Alpebo, Inc., Shreveport Ethanol, Inc., Lakefield Ethanol, Inc., A.E. Montana, Inc., CEPO, Inc. and Texas Ethanol Producers, are ethanol

producers and/or sellers. Plaintiff-Intervenor Wurster Oil Company, Inc. is a gasohol blender and has sold to distributors, but it is apparently suing only in its capacity as a seller of ethanol.

Plaintiff-Intervenors Cajun Energy, Inc. and Public Terminals, Inc. are gasohol blenders who sell to distributors and dealers.

Plaintiff State of Illinois has intervened as a Plaintiff "on behalf of all Illinois citizens, the State of Illinois and its political subdivisions."

The Defendants are major oil companies and all are members of the American Society for Testing and Materials (ASTM) and the American Petroleum Institute (API). Defendants are Shell Oil Company, Marathon Petroleum Co., Amoco Oil Company, Chevron U.S.A., Inc., Atlantic Richfield Co., B.P. America, Exxon Company U.S.A. and Mobil Corporation.

In addition to the parties described above, three parties made unsuccessful attempts to intervene as Plaintiffs and several Defendants settled out. Furthermore, diversity between the Plaintiffs and the Defendants is not complete.

Complaints

The complaints of all Plaintiffs contain essentially the same five counts: Count I alleges a contract, combination or conspiracy in violation of section 1 of the Sherman Antitrust Act. Count II alleges violations of section 26a of the Clayton Antitrust Act (the Gasohol Competition Act of 1980). Count III alleges monopolization activities in violation of section 2 of the Sherman Antitrust Act. Count IV alleges violations of the Illinois Fraud and Deceptive Practices Act and monopolization activities in violation of the Illinois Antitrust laws. Count V alleges commercial disparagement in violation of the Illinois Fraud and Deceptive Practices Act.

Plaintiffs seek treble damages in the amount of 2.85 billion dollars as well as various injunctive relief.

The original complaint was filed on June 1, 1988 in the Danville Division of the Central District of Illinois by Plaintiffs

Greater Rockford Energy and Technology Corporation, Shepherd Oil, Inc., Vidalia Ethanol, Ltd., Alpebo, Inc., Shreveport Ethanol, Inc., Lakefield Ethanol, Inc. and A.E. Montana, Inc. All of these original Plaintiffs are — or were — ethanol producers. Other Plaintiffs were allowed to intervene later, including the State of Illinois which filed its complaint on March 2, 1990. This case was reassigned to this judge and division on May 21 of the same year.

The State of Illinois claims to have been injured as follows: a. Illinois motorists and motorists nationwide have been forced to pay higher prices at the pump for motor fuel than they would have had to pay, if defendants had not suppressed competition between gasohol and gasoline in the motor fuel marketplace. b. Illinois citizens engaged in the production, distribution and sale of ethanol and gasohol have lost jobs and profits as a result of defendants' illegal activities. c. Illinois farmers and others connected with the agricultural economy of Illinois have lost jobs and profits as a result of the decreased production and sale of corn, [more] than would have occurred had defendants not substantially prevented the widespread entry of ethanol and gasohol into the mainstream of the motor fuel industry. d. The quality of the environment and the public health have been adversely affected by defendants' exclusionary activities. Gasoline blended with 10% ethanol significantly reduces harmful emissions of carbon monoxide from motor vehicles into the atmosphere. In addition, ethanol is a more efficient and safer octane enhancer than those used by defendants. Due to the suppression of ethanol from the motor fuel market, Illinois citizens and citizens across the nation have been deprived of the health benefits of gasohol. e. The local governments of Illinois, the State of Illinois itself and ultimately Illinois taxpayers have had to expend larger sums of money and will have to spend even greater sums of money to comply with the federal Clean Air Standards because of the greater pollution of the atmosphere from the burning of gasoline as opposed to gasohol. f. The general economy of the State of Illinois has been injured and damaged because of the loss of economic development that the State would have enjoyed if the ethanol industry had not been severely crippled by defendants' conduct. Illinois is now and has been capable of producing hundreds of millions of gallons of fuel ethanol annually. New investment in plant and equipment in

Illinois required to produce the ethanol necessary to meet the increased demand in a free and competitive motor fuel market would approximate one (1) billion dollars. The ripple effect of this new capacity upon the Illinois economy would be enormous. These effects include jobs created in the construction, plant operations, transportation, seed and feed industrial stimulation, fertilizer manufacturing, and other economic benefits.

The only monetary relief sought by the State of Illinois were Illinois statutory penalties. But those prayers for statutory civil penalties were dismissed by an earlier court order, leaving the State of Illinois in this suit only to pursue injunctive relief.

Prior Motions Based on Standing

At a hearing on April 14, 1989, Judge Baker denied Defendants' motion to dismiss for lack of standing to sue. In a short order entered on April 17, 1989, the Court concluded that "the allegations of the pleadings, fairly read, show that the plaintiffs are competitors of the defendants in the market for non-diesel automotive fuels, and that the plaintiffs have alleged direct antitrust injury."

On May 21, 1990, Judge Baker recused himself and the case was reassigned this case to the Springfield Division. On November 9, 1990, this Court denied a subsequent motion to dismiss stating that "on the limited record before us we cannot determine whether Plaintiffs are in fact actual competitors of the Defendants or merely more remote suppliers of direct competitors. At the conclusion of discovery, and upon a more complete record, we can revisit this issue."

The Current Motion

Discovery has now closed and the record is no longer limited — in fact, it is so voluminous that it would fill a five-drawer filing cabinet. Defendants have now moved for summary judgment based on Plaintiffs' lack of antitrust standing and injury. Because standing determinations are factually intense, we review the

record, particularly Plaintiffs' Final Statement of Contentions and Proof in excruciatingly painful detail.

Contentions and Proof

Plaintiffs were ordered to file both a preliminary and a final statement of contentions and proof. The contents of their Final Statement of Contentions and Proof (hereafter "Final Statement") are generally not organized or identified on a count-by-count basis. They quote at length from the Senate and House reports on the Gasohol Competition Act of 1980 and argue that the Act, as well as actions by other government agencies, show government acceptance of 10% ethanol blended fuels as quality fuels. The contentions which follow are drawn from Plaintiffs' Final Statement.

Plaintiffs broadly complain that Defendants "flouted Congress' intent and will expressed in the Gasohol Competition Act of 1980, and undertook a concerted and ruthless program of lawlessness, unfair competition, and anti-competitive conduct."

They state that each of the Defendants market their motor fuel through branded, vertically integrated distribution systems in competition with ethanol producers and blenders. They then contend that they "compete with defendants at every level of the integrated petroleum industry from refining down the stream." By way of example, Plaintiffs state that "in distilling ethanol with gasoline to make gasohol, plaintiffs engage or engaged in activities equivalent to defendants' operations that made crude oil into gasoline. In seeking customers for ethanol, or gasohol for distribution or resale, plaintiffs compete with defendants' distribution and marketing operations."

Plaintiffs also contend, rather incredibly, that "[s]ince defendants manufacture and market motor fuels throughout the country, plaintiffs compete with defendants in 48 contiguous states."

They opine that Defendants subjected their dealers to "economic serfdom" through interrelated agreements including a lease, a product supply contract and the trademark license. Plaintiffs state that branded franchising affords the Defendants

"a great degree of certainty about how much crude oil and refined product" they will move. They also asseverate that branded franchising "effectively precludes the system of 'open supply.'" Plaintiffs then assert that "[t]he Gasohol Competition Act of 1980 to a substantial degree could have created an open supply system."

They argue that "Defendants had an understanding to discriminate against and to disparage ethanol and gasohol so as to eliminate competition from ethanol and gasohol in the motor fuels market in violation of the antitrust laws." Apparently, the Court is to consider this alleged "understanding" as being a "contract, combination or conspiracy in violation of section 1 of the Sherman Antitrust Act" as alleged in Count I of Plaintiffs' complaint. Plaintiffs avow four bases for their assertion of Defendants' understanding and/or their assertion that Defendants violated the Gasohol Competition Act of 1980. It is claimed that: (A) each Defendant engaged in conduct that unreasonably discriminated against or limited the sale, resale, or transfer of gasohol, in violation of 15 U.S.C. § 26a; (B) Defendants unlawfully limited the use of credit card instruments in transactions involving the sale, resale or transfer of gasohol; (C) Defendants further unreasonably discriminated against or unreasonably limited the sale, resale, or transfer of gasohol through other anti-alcohol activities which decreased public acceptance of gasohol and deterred dealers and jobbers from selling gasohol; (D) Defendants communicated among themselves and other co-conspirators sensitive competitive information about the marketing of motor fuels including ethanol and gasohol.

We examine each of Plaintiffs' four asserted bases in turn.

A. Unreasonable Restrictions on Gasohol

In support of their contention that "each Defendant engaged in conduct that unreasonably discriminated against or limited the sale, resale, or transfer of gasohol, in violation of 15 U.S.C. § 26a," Plaintiffs declare that: (1) Defendants refused to permit use of existing tanks and pumps, regardless of ownership, for storage and dispensing of gasohol. In support of this assertion, Plaintiffs' provide approximately four pages of quotes from House

and Senate Reports dealing with past actions by major oil companies that the Gasohol Competition Act of 1980 was intended to address. Plaintiffs further aver that "defendants through contractual agreements and the terms thereof ["contracts" for short], as well as other communications to jobbers and dealers, have uniformly prohibited the use of existing tanks and pumps for gasohol." In an accompanying footnote, the various methods of prohibiting dealers from using existing tanks for gasohol are listed, including the use of supply agreements requiring the dealer to purchase minimum quantities from the oil company (Exxon), requiring dealers to sell all three grades of the oil company's gasoline leaving, in most cases, no underground storage tanks available for gasohol (Shell), and prohibiting dealers from "splash blending" ethanol with branded gasoline and selling it as a branded product (Chevron). (2) Defendants either failed to inform their dealers and jobbers of company gasohol policies or continued to change gasohol policies which left the dealers and jobbers in the dark about the conditions under which they could market gasohol if they chose to do so. (3) Defendants exhibited a strong antigasohol attitude, coupled with strongly worded suggestions that the dealers and jobbers must check with company representatives before they began marketing gasohol. (4) Through their debranding policies, Defendants imposed unreasonable labeling requirements on their dealers and jobbers which substantially impaired and unreasonably limited them in marketing gasohol. (5) Defendants either threatened to terminate the franchises of dealers who sold gasohol or issued subtle threats which had the effect of discouraging their sale of gasohol. The only evidence presented in support of this allegation were quotes from a Senate Report dealing with conduct of oil companies before the passage of the Act.

B. Credit Card Instruments

To support their contention that "Defendants unlawfully limited the use of credit card instruments in transactions involving the sale, resale or transfer of gasohol," Plaintiffs maintain that Gulf Oil Company, which was purchased by BP America and Chevron U.S.A., and Amoco refused to allow their credit cards to be used for the purchase of gasohol (except insofar as Amoco

allowed its card to be used to purchase Amoco branded gasohol, where it marketed gasohol), while Shell imposed a 3½% charge on gasohol purchases, and Atlantic Richfield "and others" required that special procedures be followed and that notations be made on credit card receipts for the sale of gasohol, all allegedly in violation of the Gasohol Competition Act of 1980.

C. Other Antigasohol Activities

In support of the contention that "Defendants further unreasonably discriminated against or unreasonably limited the sale, resale, or transfer of gasohol through other anti-alcohol activities which decreased public acceptance of gasohol and deterred dealers and jobbers from selling gasohol," Plaintiffs assert that: (1) Defendants engaged in an anti-alcohol campaign which had the effect of discouraging the motoring public from buying gasohol and discouraging dealers and jobbers from selling gasohol.

Plaintiffs claim that gasohol, which they parenthetically define as "ethanol enriched fuels" (although the term actually refers to gasoline blended with either ethanol or methanol), was a well accepted, high quality motor fuel. Between 1980 and 1986, ethanol sales increased steadily from 50 million gallons per year to eight hundred million gallons per year. Defendants realized that ethanol was useful from the standpoint of adding octane to fuel, especially in light of the need to phase-out lead which also boosted octane. Chevron purchased a majority interest in a Kentucky ethanol production facility and blended its own gasohol which it sold in Kentucky and portions of Tennessee. During that time, Chevron touted "the product" as being a high quality motor fuel. Amoco purchased ethanol directly from refiners, blended it with Amoco gasolines, and sold it as a branded product in certain parts of the Midwest, including Iowa, Nebraska, North Dakota and South Dakota. In the areas that Amoco marketed gasohol, Amoco touted its high quality.

It is argued by Plaintiffs that "[t]he Gasohol Competition Act allowed branded dealers to handle the product at branded locations by simply debranding the pump and continuing to use existing tanks and pumps." Defendants, beginning with Shell,

Amoco, Marathon and Chevron allegedly began to "disparage ethanol" by disseminating misleading information. "The most obvious and conspicuous campaign was the practice by which the defendants' adorned their branded stations with point of sale sign materials which shouted that the product sold . . . contained no alcohol, ethanol or methanol." [Plaintiffs' accompanying 5-page endnote makes reference to numerous signs stating "No Alcohol" and does not mention a single sign specifically referring to ethanol or methanol.] It is argued that the clear implication of these signs was "that somehow, there was something wrong with gasoline blended with 10% ethanol."

Plaintiffs also complain that: The point of sale materials omitted any reference to the actions of Congress and the EPA and other government agencies and auto manufacturers recognizing the quality of gasohol. They were further silent about the national energy policy to encourage the use of ethanol, and that gasoline dealers had a lawful right to sell gasohol. Defendants used the point of sale materials to convey the misleading message that gasohol was an inferior fuel.

Plaintiffs asseverate that Defendants "No Alcohol" advertising was misleading because it "disparaged gasohol by concealing the fact that ethanol was different than other alcohols." They provide a list of the states where each Defendant conducted their anti-alcohol campaigns; only three Defendants, Mobil, Marathon and Atlantic Richfield are listed as having conducted anti-alcohol campaigns in Illinois. Plaintiffs state that they still had not identified all the areas wherein Shell conducted its campaign.

(2) Defendants have prohibited the storage of ethanol at their terminals and thereby prohibited the blending of ethanol [and gasoline] at their terminals while permitting the storage and blending of other Defendants' detergent additives and MTBE at the same terminals.

Plaintiffs state that Defendants have gasoline terminals throughout the United States. These terminals are used to distribute gasoline to branded jobbers and dealers and to other oil companies having exchange agreements with the oil company which owns the terminal. Defendants' terminals store various

blending agents and detergent additives of the oil companies involved in the exchange agreements, but "will not accord the same distribution benefits to ethanol, prohibiting its storage at their terminals, despite offers to pay for any necessary facilities for storage *by those wishing to store ethanol.*" (Emphasis ours). [Plaintiffs do not allege that any Plaintiff approached any Defendant's terminal, offered to pay for ethanol storage and was rebuffed.] Plaintiffs complain that Defendants "have subjected *those entities wishing to blend ethanol* to unnecessary expense and burden caused when their trucks have to fill up with gasoline at the defendants' terminals and then travel to another bulk storage facility in another location to load the required amount of ethanol into the truck." (Emphasis ours).

Plaintiffs also allege an unreasonable limitation on the sale and transfer of gasohol as a result of Defendants' requirements that trucks picking up gasoline arrive empty and pick up a full load. Plaintiffs argue that this requirement "necessitated that *those wanting to blend gasoline with ethanol*" go to another facility, unload part of the gasoline, and fill up the rest of the tank with ethanol. (Emphasis ours).

(3) Defendants prohibited dealers and jobbers from using Defendant-supplied gasoline for blending with ethanol. MTBE (methyl tertiary butyl ether) is an oxygenate manufactured by Defendants and blended into some of their gasoline. If the gasoline is more than 2% MTBE by volume, EPA regulations prohibit the gasoline from being blended with ethanol. Plaintiffs assert that by refusing to disclose whether their gasoline contained MTBE or the amount of MTBE the gasoline contained, Defendants' prohibited dealers and jobbers from blending the Defendants' gasoline with ethanol. In an endnote, Plaintiffs explain that the dealers and jobbers would have to have the gasoline tested by a laboratory in order to know whether it could be blended with ethanol. The endnote does not state whether Defendants knew the MTBE contents of each gasoline delivery or whether Defendants would have to pay for testing of MTBE content in able to provide that information to the dealers and jobbers.

(4) Defendants arbitrarily and unreasonably refused to allow their branded dealers and jobbers to sell gasohol manufactured by

those Defendants themselves if the sales were not to be made within a geographic area strictly defined by that Defendant.

D. Communication Among Conspirators

In support of the contention that "Defendants communicated among themselves and other co-conspirators sensitive competitive information about the marketing of motor fuels including ethanol and gasohol," Plaintiffs assert that:

(1) Defendants' officers and employees attended various meetings of the American Petroleum Institute (API) where there were discussions or proceedings related to discouraging acceptance or marketing of ethanol and gasohol.

The API is the leading oil industry trade association and each Defendant is a member. Plaintiffs complain that after the American Society for Testing and Materials (ASTM) delayed for years in adopting a specification for gasohol and the National Conference on Weights and Measures (NCWM) and the States began pressing the ASTM for a gasohol specification, API acted to exclude "anyone other than their ASTM group from promoting a legal specification for gasohol." The alleged action to exclude everyone except ASTM from the process consisted of distributing a "referendum ballot proposing two public statements opposing ethanol and gasohol." The two proposed public statements were: (1) API should support the technical concept in the proposed [ASTM] specification for automotive spark-ignition engine fuels that all fuels should have the same volatility specifications regardless of their composition. (2) API should oppose legislative and regulatory initiatives that would establish specifications for spark-ignition engine fuels before the ASTM specification can be completed.

The two statements that Plaintiffs characterize as "opposing ethanol and gasohol" speak only of "spark-ignition engine fuels;" while gasohol falls within that definition, ethanol, by itself, does not. A 38 page endnote to Plaintiffs' claim that API's actions excluded anyone other than the ASTM from promoting a legal specification for gasohol completely fails to explain how the two proposed public statements on the referendum ballots excluded

anyone from proposing legal specifications for gasohol. (The reason that the endnote is not fully apposite to the accompanying statement may be because that same endnote is referenced at several different places in Plaintiffs' Final Statement.)

(2) Defendants' officers and employees attended various meetings of Consumers for Competitive Fuels where there were discussions or proceedings related to discouraging acceptance or marketing of ethanol and gasohol.

Plaintiffs' contend that the purpose of this association of fuel companies was "to exchange views on the 'immediate problem of ethanol.' " [Plaintiffs' quote is unattributed.] Plaintiffs assert that "[t]hrough the proceedings of this coalition Defendants have frequently and regularly discussed issues relating to the sale, marketing and transfer of gasohol."

(3) Defendants' officers and employees attended various meetings of the special interest oil and gas associations where there were discussions related to discouraging jobbers and dealers [from] marketing gasohol. Plaintiffs assert that Defendants are represented in various oil and gas associations and that these associations "afforded the defendants' representatives extensive opportunity to meet and orchestrate opposition to gasohol." (Emphasis ours).

(4) Defendants' officers and employees attended various meetings of the [ASTM] where there were discussions and proceedings conducted to discourage acceptance or marketing of ethanol or gasohol.

ASTM's purpose is "the development of standards on characteristics and performance of materials, products, systems and services." The ASTM group dealing with gasoline is Subcommittee A of Committee D02 (Subcommittee D02.A). Specification D-439 is the standard specification for gasoline. ASTM standards are routinely adopted by legislatures and government agencies as legal definitions of various products. For example, the majority of states define gasoline by direct reference to ASTM standard D-439; other states closely track D-439 in their gasoline specifications.

Plaintiffs boldly conclude, therefore, that "as a practical matter, an automotive spark-ignition engine fuel that does not meet ASTM specifications cannot be legally sold in the United States." Plaintiffs claim that the lack of a motor fuel specification that included gasohol put suppliers of ethanol for blending into gasohol and blenders and sellers of gasohol at a competitive disadvantage. It is stated that when gasohol became a potential entrant into the motor fuel market it was outside the scope of specification D-439. The volatility level of gasohol usually exceeded the ASTM standard D-439 volatility level by approximately one pound per square inch. In both 1979 and again in 1982, the EPA granted gasohol a one pound per square inch waiver from the volatility regulations. Plaintiffs avow that this federal action preempted state and local gasoline specifications that might have excluded gasohol on the basis of volatility." They opine that Congress' enactment of the Gasohol Competition Act left "no doubt where gasohol stood in the eyes of federal law" and therefore there "should have been no doubt about the need for a timely motor fuel specification that included gasohol."

Plaintiffs declare that by December, 1979 Defendants "obviously aware of the legal mandate of the EPA volatility waiver," formed the ASTM Oxygenated Fuel Task Force to consider gasohol and prepare a specification. During 1980 and 1981, ASTM Committee D-2 published an information document and a proposed specification for gasohol that essentially combined existing ASTM gasoline and ethanol requirements.

From December, 1982 to December, 1983, Defendants began working on a modification of D-439 to include oxygenates generally rather than focusing on the initial gasohol specification. Despite ASTM procedures providing for the adoption of emergency specifications while a proposal went through the normal standard-writing process, Defendants did not adopt an emergency specification for gasohol. On December 6, 1983, § 1 of Subcommittee A met in Miami and unanimously voted to recommend to Subcommittee A that the existing D-439 standard specification be revised to include a paragraph on gasoline-oxygenate blends.

Plaintiffs profess that the clear purpose of the December 6, 1983, vote was to abandon the most straightforward means of

adopting a gasohol specification and to delay the creation of a specification for gasohol by "submerging gasohol within the large generic group of gasoline-oxygenate blends." They maintain that "[f]rom 1984 to mid-1986 the proposed gasohol specification, and for that matter any new ASTM motor fuel specification, stalled." Plaintiffs insist that the ASTM's activities ignored Congress' mandate in the Gasohol Competition Act of 1980, and concentrated on whether or how the EPA volatility waiver should be recognized in drafting a new ASTM motor fuel specification.

Plaintiffs allege that in mid-1986, the National Conference of Weights and Measures was pressing ASTM for a gasohol specification and began considering writing its own specification. This allegedly led Defendants to discuss at the 1987 American Petroleum Institute meeting how to maintain control over the standards writing process through the ASTM.

(5) Defendants' officers and employees attended various meetings of the National Conference on Weights and Measures where there were discussions and proceedings conducted to discourage acceptance or marketing of ethanol and gasohol.

The NCWM membership consists of government weights and measures regulators from various states. As part of its motor fuel related activities, the NCWM meets and adopts various standards for service station gasoline pump labeling. Plaintiffs assert that the Defendants "have consistently followed and attempted to influence the activities of the NCWM in writing and adopting these standards" and that, in the process, Defendants had numerous opportunities "to confer and collude to oppose the marketing of gasohol." As an example of how the NCWM activities gave Defendants the opportunity to collude against gasohol, Plaintiffs point to Defendants' united opposition to a motor fuel specification not written by ASTM. They accuse Defendants of having misused their dominance of ASTM to delay a gasohol specification and damage the ethanol industry.

In mid-1986, the NCWM took the unprecedented step of preparing its own draft specification. This is what led Defendants to take action at the API meeting to oppose any non-ASTM specification. On March 26, 1987, the letter ballot for proposed

specification ASTM P-176 was transmitted to Subcommittee D02.A along with a memorandum from Subcommittee Section 1 Member A.L. Muller of Amoco. Muller indicated that at the Subcommittee's December 1987 meeting they recognized "the urgency to produce a Standard Specification to cover all automotive fuels [including oxygenates] to prevent legislative and other organizations from establishing specifications for motor fuels that could be different from those developed by ASTM."

Plaintiffs conjecture that the purpose of the API's two proposed public statements was to pressure the NCWM not to adopt its own specification. They claim that "[i]n dealing with the threat that NCWM posed, Defendants colluded to exclude competition from gasohol, thus injuring Plaintiffs."

(6) Defendants communicated with other Defendants concerning matters which would discourage the marketing of gasohol through "sham lobbying."

Plaintiffs assert that Defendants' representatives have lobbied Congress and various state legislatures in opposition to gasohol tax incentives and in favor of gasohol labeling laws. They state that these lobbying activities afforded Defendants' representatives numerous opportunities to confer and plan marketing efforts to oppose gasohol.

(7) Defendants used the trade press to communicate with each other about their plans and activities to discourage acceptance or marketing of ethanol and gasohol.

(8) Defendants used their various mutual supply exchange arrangements as opportunities to communicate their plans and activities to discourage acceptance or marketing of ethanol and gasohol. Plaintiffs state that "[f]or convenience and economy considerations Defendants repeatedly exchanged gasoline with each other to obtain the gasoline from the refineries closer to the station's supply." It is argued that through these exchange agreements, Defendants agree on specifications and oxygenate content that prohibit the gasoline from being blended with ethanol.

(9) Defendants used their various mutual pipeline arrangements as opportunities to communicate their plans and activities

to discourage acceptance or marketing of ethanol and gasohol. Plaintiffs declare that "[b]y and large" the major pipelines in the United States that are used to transport gasoline are owned and/or controlled by Defendants. Defendants agree on the gasoline blend that may be transported by these pipelines and therefore control the oxygenate level of the gasoline available for blending with ethanol in specific areas. Plaintiffs state, without any elaboration, that Defendants "agree in their opposition to allowing pipelines to be used for transporting gasohol."

(10) Defendants communicated with each other through their jobbers about using advertising that attacked the use of alcohol gas blend fuels.

(11) In addition to the opportunities for communications to coordinate anti-gasohol activities (discussed in 1-10 above), Defendants have utilized other means and opportunities of communication for the same purposes.

Plaintiffs support their "other means and opportunities" assertion with an endnote that states that an Exxon branding guideline was obtained from Shell's files.

Plaintiffs offer no separate statement of proof in support of their Illinois state law claims; rather, they simply state that it is the same as the proof offered in support of Plaintiffs' federal claims.

Included at the end of the Final Statement are four "attachments". A few facts set forth in the last attachment deserve mention.

The last attachment includes a graph showing ethanol fuel sales from 1978 through 1990. This graph shows a continuous increase in ethanol fuel sales from 20 million gallons per year in 1978 to 825 million gallons per year in 1987. From 1987 to 1990 ethanol fuel sales gradually decreased to approximately 710 million gallons. A second chart also shows a constant increase in ethanol blend sales from 1980 to 1985. Finally, a map showing "ethanol blends market penetration" in 1986 indicates that ethanol blends represented slightly more than 24 percent of the fuel sold in Illinois.

Other Facts

Also in the record are pertinent facts contained in various documents attached to a motion by Defendants to disqualify Plaintiffs' lead counsel. The basis for the motion to disqualify was that Plaintiffs' lead counsel, Bob Wright, who is an 85% shareholder of Plaintiff Alpebo, represented Plaintiffs Alpebo and Shepherd Oil, along with two other companies who are not parties to this action, in a lawsuit against the Secretary of the Department of Agriculture for injunctive and declaratory relief. The complaint in that case contains the following statements and claims: (1) Plaintiffs Alpebo and Shepherd Oil are in the business of producing fuel ethanol from sugar and molasses feed stocks. Neither Alpebo's nor Shepherd's ethanol plants are capable of using corn or other grain feed stocks and it would require "very substantial" efforts and expenditures to convert the facilities to use those feed stocks. (2) Of the ethanol fuel produced in the United States, 72% is made from corn, 11% is made from other grains, 11% is made from sugar or molasses, and 6% is made from waste or other feed stocks. (3) The sector of the ethanol production industry utilizing corn or other grains is dominated by large ethanol producers including Archer Daniels Midland, which produces 60% of all domestically made ethanol, Pekin Energy, which is half-owned by Texaco, South Point Ethanol, which is half-owned by Ashland Oil, and New Energy Co., which is partly owned by E.F. Hutton. These producers or their parent corporations are in strong financial positions. (4) "Plaintiffs and other sugar and molasses-based producers are, in general, small companies that operate on narrow margins and will face severe hardship and possible insolvency if ethanol prices fall significantly." (5) A dramatic, worldwide drop in oil prices has reduced gasoline prices and put downward pressure on ethanol prices. At the same time, the price of feed stocks used in making fuel ethanol have remained and can be expected to remain stable at relatively high levels due to federal price support programs. The Secretary of Agriculture has found that many ethanol producers are "threatened with imminent failure because of financial problems due to the decline in energy prices." Citing 51 Fed.Reg. 21940 (June 17, 1986). (6) Producers such as the Plaintiffs whose production comes from sugar, molasses and other non-grain feed

stocks are in a "particularly severe" economic situation because they tend to be far smaller and less profitable than the larger concerns that dominate the grain-based sector of the ethanol industry. The feed stock cost for sugar-based producers are higher than those of the grain-based producers. (7) On May 2, 1986, Secretary of Agriculture Richard Lyng announced in a press release a temporary assistance program to allow ethanol producers to survive and to compete with falling gasoline prices. The temporary assistance program, however, based the subsidy on the amount of grain a producer converted to ethanol and thereby excluded all non-grain-based producers. (8) Plaintiffs asserted "irreparable injury" as a result of the Secretary's decision to exclude them from the subsidy program. Plaintiffs stated that they faced the "imminent threat of having to shut down their ethanol production for inability to compete with gasoline at currently low prices. Such shutdowns would be particularly devastating for Plaintiffs because they are relatively small concerns and could well be thrown into insolvency if they are not able to produce and sell ethanol." Plaintiffs further stated that the current program would "exacerbate the economic plight Plaintiffs face and will increase the danger that Plaintiffs will be forced out of business."

In a memorandum of points and authorities in support of a motion for a preliminary injunction in the Department of Agriculture suit, Plaintiffs stated that "the industry is very highly concentrated and dominated by a few large firms, all of whom are eligible for participation in the Secretary's subsidy program. The leading firm, Archer Daniels Midland (ADM), a diversified agribusiness conglomerate, has 60% of the domestic fuel ethanol market. ADM reported profits of $167 million in 1985."

On September 29, 1986, summary judgment was granted in favor of the Secretary of Agriculture on the complaint brought by Alpebo, Shepherd and two other companies.

Returning to this case, it appears that many of the Plaintiffs are not in a strong financial position. Along with the statements regarding the financial weakness of Alpebo and Shepherd quoted above, there is evidence in the record of the weak financial status of other Plaintiffs. In response to this Court's request for further

briefing on the issue of whether Plaintiffs' lead counsel, Bob Wright, should be disqualified because of his position as president and 85% shareholder of Alpebo and his role in the previous lawsuit, Plaintiffs (other than Cajun Energy and Public terminals) filed a memorandum opposing his disqualification. In that memorandum they stated that Mr. Wright was handling this case on a contingency basis and "[m]any of the corporations which are plaintiffs may be financially unable to support the ongoing litigation or to pay attorney's fees."

In the State of Illinois' response to Defendants' motion to disqualify Mr. Wright, Illinois stated: "The contributions of Mr. Wright to the advancement of this lawsuit have been and continue to be enormous and irreplaceable. The State of Illinois does not have the allocable resources to vigorously pursue the prosecution of this lawsuit on its own, absent the resources of private counsel, most importantly Bob F. Wright."

An appendix to Defendants' motion for summary judgment is filled with documents, affidavits, and deposition testimony damning to Plaintiffs' case: A report by Arthur Young in Shepherd Oil's Consolidated Financial Statements for 1986 states that "certain major customers of the Company have announced their withdrawal from marketing blended gasoline using ethanol." In his remarks to the Louisiana legislature, Patrick Hamilton, President of Agrifuels Refining, Inc., stated that: "The gasohol industry cannot survive without the incentives approved by the legislature in 1979." Jim Creaghan, speaking as a representative of the Louisiana Ethanol Association and Shepherd Oil urged the Louisiana legislature to pass a bill continuing a tax exemption for ethanol. As Shepherd Oil's representative, he stated: "The tax exemption was vital to the survival and development of Shepherd Oil. Without it, it is probable that Shepherd would not have continued to operate in Louisiana." The general manager of Cajun Energy testified that following passage of Louisiana's three-inch labeling law, Cajun's sales dropped by 50%. He further testified that the overall Louisiana gasohol market decreased by 66% to 72% as a direct result of the law. A letter from Citgo Petroleum to Shepherd Oil gave notice that Citgo would no longer purchase ethanol from Shepherd because Southland Cor-

poration had notified Citgo that they would cease selling blended gasoline in Louisiana. Citgo attributed Southland's decision to the impact of the Louisiana labeling law. An affidavit of Shepherd Oil's former director of marketing and commodities brims with statements undermining Plaintiffs' contentions. He states that he has seen several serious problems that confront small ethanol producers, which he defined as producers with a production capacity of less than 10 million gallons per year, and make it hard for them to effectively compete. He further stated that small producers "have difficulties achieving suitable economies of scale" and that "[e]ven a producer like Shepherd, which had between 32 and 36 million gallons of theoretical capacity could not achieve economies of scale because manufacturing deficiencies seriously reduced its true output capacity." Shepherd's former director of marketing and commodities observed that ethanol producers using molasses as a feedstock had price and production problems. Shepherd converted its plant to utilize corn because of production requirements and a "homegrown" requirement for obtaining state subsidies. He also stated that Shepherd and other Louisiana producers faced higher transportation costs because they were outside the midwest which is a principal source of grain. Further, Shepherd had to pay for grain "up front" because of its poor credit rating. He opined that "small producers can only profitably market ethanol in a limited geographic area." Transportation of a hazardous material, such as ethanol, is uneconomical without access to rail and barge Shepherd and other small producers had access to neither. Shepherd's former director of marketing and commodities explained that small ethanol producers "faced tough competition from large midwestern ethanol producers" which could achieve economies of scale, had direct access to railroad tracks, had better reliability, were able to ship by railroad track or barge at reduced rates, could capture and sell some of the profitable by-products of their ethanol production and could produce fructose in the Spring and Summer when it is in high demand. In addition to competition from much larger midwestern producers, the small Louisiana producers competed amongst themselves. At a time when the combined Louisiana ethanol demand was 3 million gallons per year, Louisiana producers had a combined capacity of 8 million gallons per year.

Shepherd Oil had problems with moisture content and some of Shepherd's purchasers, including Cajun Energy, produced blends that "caused instances of consumer dissatisfaction" and hurt the public's perception of gasohol. In particular, some Louisiana gasohol users had problems with "vapor lock." Shepherd's former marketing director also stated that "[e]ven before the discontinuance of the Louisiana state subsidy, Shepherd filed for Chapter 11 bankruptcy protection. When Louisiana discontinued its state subsidy, Shepherd could not survive." He opined that the problems mentioned above "and the drop in the market price of gasoline, accounted for the failure of Shepherd and other small ethanol producers."

Finally, it should be pointed out that the record shows that it was not only the Defendants who voted against the early proposals for a gasohol specification; representatives of alcohol producers including A.E. Staley voted against it as well. A report written by a representative of one of the Defendants concludes that the gasoline producers have no incentive to push through a specification and the gasohol producers are not anxious to be limited by a standard. While Plaintiffs' refer only to a 90% gasoline/10% ethanol blend, that was not the only gasohol on the market; the record reveals that one Plaintiff, Cajun Energy, sold a blend containing as little as 62% gasoline.

Arguments

a. Defendants

Defendants' motion for summary judgment based on lack of antitrust standing and injury seeks summary judgment against the 13 private Plaintiffs involved in this action.

Defendants first argue that under Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374 (7th Cir.1987) each Plaintiff must establish that it is a competitor or consumer in the market that Defendants allegedly restrained in order to have standing. Defendants point out that Plaintiffs' Final Statement alleges that Defendants restrained the market for motor fuels. Defendants then observe that eleven of the private Plaintiffs are ethanol producers and/or sellers. Standing alone,

ethanol is not a motor fuel. Rather, it is simply a component of a motor fuel known as gasohol. It is gasohol, not ethanol, that competes with gasoline in the motor fuels market. Defendants point out that in depositions when representatives of the Plaintiffs were asked to identify their competitors, they named ethanol producers such as Archer-Daniels-Midland, A.E. Staley, and Pekin Energy. Plaintiffs did not identify Defendants or other gasoline producers and marketers.

The 11 Plaintiffs who are ethanol producers and/or sellers sell their product to "blenders" who blend the ethanol with gasoline to create gasohol. In fact, one of the Plaintiffs, Lakefield Ethanol, does not even sell to blenders, but instead produces a lower grade ethanol that is sold to an upgrader that processes it and then sells it to a blender. Gasohol blenders mix ethanol and gasoline together, along with other components or additives, to produce gasohol. Defendants take the position that the ethanol producers are analogous to suppliers of a competitor in a restrained market and do not have standing. Plaintiffs Cajun Energy and Public Terminals are gasohol blenders. Defendants argue that they lack standing because they do not sell on a retail level. Public Terminals is basically a blender for Cajun Energy. Cajun Energy buys the gasohol components and provides them to Public Terminals for blending and then markets the finished blend to dealers and distributors.

Defendants maintain that the injuries alleged by the Plaintiffs in this case are indirect rather than direct. It is claimed that Defendants engaged in practices causing their branded dealers and jobbers not to sell gasohol. It would therefore be the dealers and jobbers who were the directly injured parties. Similarly, Plaintiffs' complaints about "no alcohol" advertising fail to allege a direct injury. Plaintiffs say in their Final Statement that the advertising "had the effect of discouraging the motoring public from buying gasohol and discouraging dealers and jobbers from selling gasohol." Defendants argue that the injury to the 11 Plaintiffs that did not produce or sell gasohol would only have been an indirect result of the more direct injury caused to gasohol blenders. However, the injuries of the gasohol blenders that are alleged in this case were also indirect because it could only have

resulted from injuries to dealers and jobbers. Defendants opine that dealers, distributors and consumers of motor fuels would be more appropriate plaintiffs.

Defendants further claim that Plaintiffs' alleged injuries are highly speculative. They point to automobile warranty statements discouraging the use of gasohol and media reports criticizing alcohol blended motor fuels. Defendants observe that Plaintiffs' own experts have admitted that automotive warranty statements and media reports would have caused consumers to avoid gasohol purchases.

Defendants also argue that even if Plaintiffs' claim about "no alcohol" advertising is true, the record shows that numerous non-defendants engaged in similar advertising and therefore Plaintiffs' claim that their injuries were caused by the Defendants' advertising is speculative.

Defendants emphasize evidence in the record that Plaintiffs were extremely dependent on ethanol and gasohol subsidy programs and that the discontinuance of these subsidy programs severely impacted Plaintiffs.

Defendants assert that all of the Plaintiffs are small-scale producers; none of the Plaintiffs actually produced more than 10 million gallons a year and most of them produced less than three million gallons per year. Defendants stress numerous statements in the record by various representatives of the Plaintiffs on the adverse effects of the Louisiana labeling law.

In addition, Defendants point out that representatives of Shepherd Oil, Lakefield Ethanol, and Greater Rockford testified in depositions that their companies had difficulties competing effectively with large ethanol producers like ADM. They also observe that Plaintiffs have asserted in lawsuits challenging state pump-labeling laws that those laws had a negative impact on their businesses.

Defendants aver that Plaintiffs' claims pose a risk of duplicative recovery and would require complex, if not impossible, damages apportionment. As an example, they point out that Freeport had an output contract with Wurster Oil whereby Wurster bought

Shreveport's entire ethanol production. Wurster then blended that ethanol with gasoline and sold the resulting gasohol. Both Wurster and Shreveport are claiming damages for the same alleged violations in this case. The relationship between Plaintiff Terminals and Cajun Energy presents a similar potential for duplicative recovery. In addition, any lost profits to Cajun result from more direct injuries to their customers who were dealers and distributors of gasohol. If these dealers and distributors later brought suit, Defendants claim that they could be subject to duplicative liability.

Defendants also argue that Plaintiffs are unable to demonstrate any antitrust injury. To show antitrust injury, a plaintiff must show an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes Defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

b. Plaintiffs

Plaintiffs' arguments may be briefly summarized. They argue that ethanol is a substitute motor fuel because "[e]ach gallon of ethanol displaces one gallon of motor fuel mix that consumers purchase" and "a motorist can choose to purchase either fuel containing ethanol or fuel not containing ethanol." (Emphasis ours.)

They also claim that as competitors they have standing to challenge Defendants' boycott of ethanol and gasohol. [An interesting argument since Plaintiffs have never alleged a boycott.]

They argue in the alternative that if they are not competitors, under Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), non-competitors, including suppliers to competitors have standing to sue. Finally, they maintain that they are not "second-best" plaintiffs, but if they are, even second-best plaintiffs have standing so long as their injuries are not derivative.

II. ANALYSIS

Monopolization Claims

We begin our analysis on a point largely ignored in Plaintiffs' final statement of contentions and proof — Plaintiffs' monopolization claims under § 2 of the Sherman Act.

In a memorandum filed in opposition to several Defendants' motions for summary judgment, Plaintiffs state in a footnote that discovery has not progressed far enough to allow them to fully set forth their monopolization claims and that, in view of the strength of the rest of their case, they "do not believe it necessary to pursue further the monopolization claims in order to prove their entitlement to the prayed-for relief. Accordingly, plaintiffs withdraw their Section 2 claims."

The Court treats Plaintiffs' purported withdrawal of the monopolization claims as a motion to dismiss those claims under Fed.R.Civ.P. 41(a)(2). Under Fed.R.Civ.P. 41(a)(2), the Court may dismiss a claim at the Plaintiffs' instance "upon such terms and conditions as the Court deems proper." In this case, Plaintiffs' attempt to withdraw their monopolization claims includes what is basically an admission that they have not fully presented these claims in the Final Statement of Contentions and Proof and comes in the wake of several motions for summary judgment filed by various Defendants. The Court therefore deems it proper to dismiss with prejudice Count III of the Plaintiffs' and intervenors' complaints alleging monopolization activities in violation of § 2 of the Sherman Act and that portion of Count IV that alleges monopolization activities in violation of the Illinois antitrust laws.

Permitted Conduct

Before addressing the question of standing directly, it is appropriate to consider whether some of the contentions in Plaintiffs' Final Statement of Contentions and Proof are even sufficient to state a claim.

Some of Plaintiffs' allegations ignore the nature of the obligations imposed by the antitrust laws. For example, Plaintiffs' complaint that the Defendants refused to disclose the MTBE

content of their gasoline in order to make it easier for others to mix it into gasohol is basically a complaint that Defendants did not do enough to promote gasohol. However, businesses "needn't acquiesce to every demand placed upon them by competitors or customers; [their] duties are negative — to refrain from anticompetitive conduct — rather than affirmative — to promote competition." Illinois ex rel Burris v. Panhandle Eastern Pipe Line Company, 935 F.2d 1469, 1484 (7th Cir.1991), cert. denied, ____ U.S. ____, 112 S.Ct. 1169, 117 L.Ed.2d 415 (1992) (citing Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375-376 (7th Cir.), cert. denied, 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1986)) (discussing duties of a monopolist).

Two rules are used to judge allegedly anticompetitive conduct. The "per se rule" is applied to types of conduct that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry into the precise harm they have caused or the business excuse for their use." Northwest Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (quoting Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)). Examples of conduct subject to the per se rule include price fixing schemes, certain types of group boycotts, market allocations and tying arrangements. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir.1984) (citing Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 555 (7th Cir.1980)). Conduct not subject to the "per se rule" should generally be evaluated under the "rule of reason." See Wilk v. American Medical Ass'n, 895 F.2d 352, 359 (7th Cir.1990), cert. denied, 496 U.S. 927, 110 S.Ct. 2621, 110 L.Ed.2d 642 (1990). The "rule of reason" applies to "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). The "threshold issue" in a rule of reason case is market power which is the ability to affect the allegedly restrained market. Wilk v. American Medical Ass'n, 895 F.2d at 359-360.

Under either the "per se rule" or the "rule of reason" "the purpose of the analysis is to form a judgment about the competitive significance of the restraint . . ." National Soc. of Professional Engineers, 435 U.S. at 692, 98 S.Ct. at 1365.

Several of the Defendants' activities that Plaintiffs claim violate the antitrust laws need not be analyzed under either the "per se rule" or the "rule of reason" because they are either outside the reach of the antitrust laws or explicitly permitted under the section of the Clayton Act Plaintiffs allege was violated.

Plaintiffs' final statement states that Defendants have lobbied Congress and various state legislators in opposition to gasohol tax incentives and in favor of gasohol labeling laws. [They do not, however, explain how Defendants' lobbying efforts in opposition to special tax incentives for gasohol differs from Plaintiffs' lobbying efforts in support of those same incentives.]

Plaintiffs gratuitously characterize Defendants' lobbying activities as "sham lobbying." Plaintiffs also complain that Defendants "followed and attempted to influence the activities of" the National Conference on Weights and Measures. That organization is, according to Plaintiffs, composed of state regulators. Three Supreme Court cases dealing with lobbying and the Sherman Act clearly undermine Plaintiffs' claims.

In Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), the Supreme Court stated that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." Noerr Motor Freight, Inc., 365 U.S. at 136, 81 S.Ct. at 529. The Court went on to say that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." Noerr Motor Freight, Inc., 365 U.S. at 139-40, 81 S.Ct. at 531. The legality of the railroads' campaign was not affected by the railroads' use of the "so-called third-party technique" which "depends upon giving propaganda actually circulated by a party in interest the appearance of being spontane-

ous declarations of independent groups." Noerr Motor Freight, Inc., 365 U.S. at 140, 81 S.Ct. at 531. While such a campaign may not be ethical, "a publicity campaign to influence governmental action falls clearly into the category of political activity. The prescriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena." Noerr Motor Freight, Inc., 365 U.S. at 140-41, 81 S.Ct. at 531.

In United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965), the Supreme Court held that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." Pennington at 670, 85 S.Ct. at 1593. The Court stated further that "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." Pennington at 670, 85 S.Ct. at 1593.

In Columbia v. Omni Outdoor Advertising, Inc., ____ U.S. ____, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), the Supreme Court refused to recognize a "conspiracy" exception to Noerr based on "the principle that the antitrust laws regulate business, not politics." Omni Outdoor Advertising, 111 S.Ct. at 1355. The Omni Outdoor Advertising Court also discussed the "sham" exception recognized in Noerr. In Noerr, the Court stated: "There may be situations in which a publicity campaign, ostensibiy directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." Noerr, 365 U.S. at 144, 81 S.Ct. at 533.

In Omni Outdoor Advertising, the Court explained that "[a] sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result but does so through improper means." Omni Outdoor Advertising, 111 S.Ct. at 1354 (citations and quotation marks omitted)

(emphasis in original). Plaintiffs' Final Statement contains no proof that Defendants' lobbying efforts were not intended to get results. In fact, Plaintiffs complain that Defendants' lobbying of the NCWM had its desired effect.

The Gasohol Competition Act of 1980 is central to Plaintiffs' case. Even their conspiracy claim under the Sherman Act is based on violations of the Gasohol Competition Act. The Act provides: § 26a. Restrictions on the purchase of gasohol and synthetic motor fuel (a) Limitations on the use of credit instruments, sales, resales, and transfers Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that — (1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or (2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States. (b) Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities (1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit. (2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available. (3) Noth-

ing in this section shall — (A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person; (B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel; (C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or (D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel. (c) Definition As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States and any insular possession or other place under the jurisdiction of the United States. 15 U.S.C. § 26a(a) (emphasis ours).

Plaintiffs' Final Statement largely ignores the statements under § 26a(b) about what actions the Gasohol Competition Act of 1980 does not preclude or require. Without discussing § 26a(b)(3) or attempting in any way to show why it should not apply, Plaintiffs allege that Defendants violated both § 1 of the Sherman Act and § 26a by requiring its dealers to post signs on gasohol pumps clearly indicating that it was not straight gasoline and providing dealers with signs stating that the fuel being sold contains no alcohol.

The only indication that Plaintiffs' even read 26a(b)(3) is that Plaintiffs characterize Defendants' labeling requirements as unreasonable because they have an anticompetitive effect. Of course, there would be no purpose in stating that § 26a does not preclude reasonable labeling requirements if a labeling requirement is only reasonable when not anticompetitive. If it is not anticompetitive, the labeling requirement would not bring the antitrust laws into effect and there would be no need for this exemption.

Summary Judgment Standard

We turn, finally, to the question of whether the Defendants are entitled to summary judgment on the issue of antitrust standing. Under Fed.R.Civ.P. 56(c), summary judgment should be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Unquestionably, in determining whether a genuine issue of material fact exists, the evidence is to be taken in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970). Nevertheless, the rule is also well established that the mere existence of some factual dispute will not frustrate an otherwise proper summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). And in a case under § 1 of the Sherman Act, the permissible inferences which may be drawn from ambiguous evidence are limited and "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (dealing specifically with an antitrust claim based on price competition).

Standing to Sue for Treble Damages

The thirteen private Plaintiffs seek treble damages under § 4 of the Clayton Act. At this stage, the State of Illinois is pursuing only injunctive relief (its claims for statutory penalties under state law having been dismissed almost two years ago).

Initially, it must be remembered that "antitrust standing" to sue for treble damages under § 4 of the Clayton Act is more demanding than "constitutional standing." While injury in fact is sufficient to create "constitutional standing," further requirements must be met for "antitrust standing." See Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n. 31, 103 S.Ct. 897, 907 n. 31, 74 L.Ed.2d 723

(1983). As the Supreme Court has stated: An antitrust violation may be expected to cause ripples of harm to flow through the nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoers should not be held liable." [Illinois Brick Co. v. Illinois, 431 U.S. 720] at 760 [97 S.Ct. 2061, 2082, 52 L.Ed.2d 707 (1977)] (Brennan, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Of course, neither the statutory language nor the legislative history of § 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to for the predicate for a suit under § 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by the courts at common law with respect to the matter of "proximate cause." Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-477, 102 S.Ct. 2540, 2547, 73 L.Ed.2d 149 (footnote and citations omitted) (1982). More recently, the Supreme Court stated that with respect to both proximate cause and standing to sue for treble damages that "the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case." Associated General Contractors, Inc., 459 U.S. at 536, 103 S.Ct. at 908 (footnote omitted).

While there is no black-letter rule for determining the existence of antitrust standing, the Supreme Court has identified the following relevant factors for making that determination: (1) the causal connection between the alleged antitrust violation and the harm; (2) whether the Defendants intended to cause the harm; (3) the nature of the injury, specifically, whether the "injury was of a type" that Congress sought to redress by providing a private remedy for antitrust violations; (4) the directness or indirectness

of the alleged injury; (5) the speculative nature of the claimed damages; and (6) the risk of duplicate recoveries or the danger of complex apportionment of damages. Associated General Contractors, Inc., 459 U.S. at 537-545, 103 S.Ct. at 908-912. We consider each of the factors for antitrust standing in turn.

Causal connection. The causal connection between the alleged antitrust violations and the harm claimed by Plaintiffs is weak. Although Plaintiffs occasionally state that Defendants intended to harm ethanol and gasohol, it is abundantly clear from the record that the actions Plaintiffs complain of could have only indirectly injured ethanol sales. It is also significant that the time periods when various Plaintiffs encountered their worst economic woes fall within the time period from 1978 to 1987 during which period nationwide gasohol sales increased by more than 4,000%. Obviously, some ethanol producers must have been enjoying dramatically increased sales, most probably the larger ethanol producers such as Archer Daniels Midland and A.E. Staley identified in the suit by Alpebo, Shepherd, and two other companies against the Secretary of the Department of Agriculture.

Intent. There is no evidence that the Defendants intended to injure ethanol producers or gasohol wholesalers. The question of intent, however, is not controlling. See Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) (absence of specific intent to harm plaintiff does not render injury remote).

Nature of the injury. The antitrust laws "were enacted for the 'protection of competition, not competitors.' " Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488, 97 S.Ct. at 697 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)). In order to recover treble damages, Plaintiffs "must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." Brunswick, 429 U.S. at 489, 97 S.Ct. at 697. If, as appears probable in this case, Plaintiffs' loss of market share was a result of being unable to

compete with larger ethanol and gasohol producers, they clearly fail to satisfy the standard.

Directness of the injury. As already stated, the injuries allegedly suffered by the private Plaintiffs are remote. Plaintiffs claim that Defendants disparaged gasohol and restrained competition between gasohol and gasoline. And they agree with the Defendants that the relevant market is the motor fuels market. Plaintiffs claim that every drop of ethanol contained in gasohol displaces a drop of gasoline simply does not mean that ethanol and gasoline compete with one another in the market. As of yet, cars don't run on pure ethanol. Plaintiffs' argument that because the drop of gasohol replaces the drop of gasoline the two products compete in the market is wholly untenable. Automobiles contain countless screws and bolts. When a Ford is sold, a different batch of nuts and bolts is on the roadway than when a Cadillac is sold. Nonetheless, the supplier of nuts and bolts to Cadillac is not by itself a competitor of Ford.

Plaintiffs also argue that Defendants wronged their dealers in numerous ways. These allegations are perhaps summed up in Plaintiffs' claims that Defendants' dealers were kept in "economic serfdom." None of the Plaintiffs, however, were dealers nor were they generally selling gasohol to dealers. Therefore any effect on Plaintiffs that could have occurred if Defendants prohibited their dealers from selling gasohol is both indirect and remote.

Defendants assert that under Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374 (7th Cir.1987), Plaintiffs lack standing because they are neither competitors nor consumers in the relevant market. Plaintiffs maintain that Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) opens up the door to non-competitors including suppliers. Neither proposition is quite correct. In McCready, the Supreme Court allowed a consumer of psychological services to bring suit under the antitrust laws based on an alleged conspiracy between Blue Shield of Virginia and the Neuropsychiatric Society of Virginia to deny reimbursement to insureds who utilized psychologists (as opposed to psychiatrists) unless the treatments was billed through a physician. Under the facts of that case, the Court considered it unreasonable to restrict

the antitrust remedy to the competitors the conspirators were attempting to exclude from the market. McCready, 457 U.S. at 479, 102 S.Ct. at 2548. "Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged conspiracy." McCready, 457 U.S. at 479, 102 S.Ct. at 2548. The Court therefore rejected Defendants' claims that McCready's alleged injury was too fortuitous, incidental and remote to provide her with antitrust standing. McCready, 457 U.S. at 478, 102 S.Ct. at 2547.

In distinguishing McCready from earlier cases, the Supreme Court emphasized that while it was McCready's employer who was the "consumer" in the sense that it paid for insurance coverage, it was McCreary who suffered the out of pocket loss since she had paid the treating psychologist. The Court noted that while Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972) and Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) focused on the risk of duplicative recovery in allowing parties down the distribution chain to claim damages, allowing McCready and her class "to proceed in the circumstances of this case offers not the slightest possibility of a duplicative exaction from petitioners." McCready, 457 U.S. at 473-475, 102 S.Ct. at 2545-2546. Obviously, the unusual lack of risk of duplicative recoveries in the McCready case is not common to this case.

In Southwest Suburban Bd. of Realtors, Inc., the case cited by Defendants for the proposition that Plaintiffs lack standing because they are neither suppliers nor consumers in the relevant market, the Seventh Circuit denied standing to an association of realtors. And the Seventh Circuit did, in fact, point out that the board was neither a supplier nor a purchaser in the brokerage services market that was allegedly restrained. Southwest Suburban Bd. of Realtors, Inc., 830 F.2d at 1379. More importantly, however, the Seventh Circuit stated that "[m]erely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute 'antitrust injury'

sufficient to confer standing." Southwest Suburban Bd. of Realtors, Inc., 830 F.2d at 1378 (citing Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 533-535 and 541, 103 S.Ct. 897, 906-907 and 910).

We do not perceive any substantial inconsistency between Southwest Suburban Bd. of Realtors, Inc. and McCready. Neither case indicates that a party who suffers an injury derivative of an injury to a competitor or customer has standing.

While our decision must be based on the factors set forth in the Supreme Court's decision in Associated General Contractors, Inc., we nonetheless briefly consider Plaintiffs' general contention that suppliers have standing. While the approach set out in Associated General Contractors, Inc. has replaced earlier tests for antitrust standing, we note that the weight of authority in earlier cases held that suppliers did not have standing to seek monetary damages. See e.g., Hauer v. Bankers Trust New York Corp., 425 F.Supp 796 (E.D.Wis.1977) (target area test); Associated Radio Serv. Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir.1980), cert. denied, 450 U.S. 1030, 101 S.Ct. 1740, 68 L.Ed.2d 226 (1981) (target area test); Volasco Products. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir.1982), cert. denied, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963) (direct injury test). But see, South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir.), cert. denied, 385 U.S. 934, 87 S.Ct. 295, 17 L.Ed.2d 215 (1966) (supplier had standing under target area test). Aside from their strained interpretation of McCready, Plaintiffs have not cited us any cases establishing a general rule that suppliers have antitrust standing.

Speculative nature of claimed damages. The speculative nature of Plaintiffs' damages is the stake through the heart of Plaintiffs' damages claim. The Plaintiffs who are wholesale distributors of gasohol sell to gasohol retailers. The Plaintiffs who are ethanol producers sell to gasohol blenders or, in at least on case, to an ethanol upgrader. Thus, any injury they suffer as a result of an injury to the retail motor fuels market is obviously derivative. Even more significant than the remoteness of the alleged injuries is the abundance of other possible causes for Plaintiffs' economic woes. Plaintiffs suffered a decrease in demand even while the

market for gasohol was increasing dramatically. When gasoline prices fell in 1986, several small ethanol producers (including at least a couple of the private Plaintiffs in this case) were hurt not just by the price competition between gasoline and gasohol and its resulting downward pressure on ethanol prices, but by the fact that corn and grain-based ethanol producers benefitted from temporary Department of Agriculture subsidies that were not available to ethanol producers using other feedstocks.

Plaintiffs' claim that gasohol sales were diminished by the delay in the adoption of a standard specification is not supported by the evidence. Plaintiffs' assertion that "as a practical matter, an automotive spark-ignition fuel that does not meet ASTM specifications cannot be legally sold in the United States" is incredible in light of the more than 4000% increase in gasohol sales between 1978 and 1987. It was in 1988, the year the specification for gasohol was adopted, that gasohol sales began to sag.

Simply stated, Plaintiffs' Final Statement, filed 33 months into this case, reveals a case based more on innuendo than evidence.

Risk of duplicative recoveries and danger of complex apportionment. The risk of duplicative recoveries and the danger of complex apportionment are affected by some of the factors already discussed. As previously stated, the damage Defendants' actions allegedly caused Plaintiffs is derivative of more direct damages that those allegedly caused gasohol retailers. The speculative nature of the claimed damages is apparent from the existence of other possible, and frankly much more probable causes of the private Plaintiffs' economic losses.

The derivative nature of Plaintiffs' claimed damages combined with the highly speculative nature of the damages leads this Court to conclude that granting Plaintiffs standing would run the risk of duplicative recoveries and, should Plaintiffs prevail, guarantee complex apportionment of damages. We therefore hold that the 13 private Plaintiffs involved in this suit lack standing to pursue their treble damages claims as a matter of law.

Injunctive Relief

i. Private Plaintiffs

We turn then to the question of whether the thirteen private Plaintiffs have standing to pursue injunctive relief. The Supreme Court has determined that "in order to seek injunctive relief . . . a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' " Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986). Injunctive relief is available for private parties "against threatened loss or damage by violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ." 15 U.S.C. § 26, Clayton Act § 16. Before looking at the elements Plaintiffs must satisfy in order to obtain injunctive relief, the Court observes that the private Plaintiffs request for injunctive relief in this case does not appear serious. Plaintiffs' Final Statement fails to even address the requirements that must be satisfied before injunctive relief can be granted.

The record reveals also that several Plaintiffs are no longer in the ethanol production or gasohol blending business. As already stated, in order to obtain injunctive relief, "a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes the defendants' acts unlawful.' " Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986). Obviously a plaintiff who has already gone out of business no longer faces a threat of loss or damage. Nonetheless, Plaintiffs make no mention of the fact that not all Plaintiffs can possibly be entitled to injunctive relief. The request by the private Plaintiffs for injunctive reliefs was casually thrown into the Plaintiffs' complaints and prayer for relief and, accordingly, it is now a throw away.

ii. State of Illinois

Defendants have not challenged the standing of the State of Illinois to pursue the alleged antitrust violation and the State clearly stands on a different footing, when it comes to antitrust standing, than do the private Plaintiffs. The Court is aware that the dismissal of the original Plaintiffs to this suit does not require the dismissal of a party that has intervened. See United States Steel Corporation v. Environmental Protection Agency, 614 F.2d 843 (3rd Cir.1979); Magdoff v. Saphin Television & Appliance, Inc., 228 F.2d 214 (5th Cir.1955). Nonetheless, several factors lead the Court to conclude that the State's case should be dismissed without prejudice.

The State of Illinois intervened in this action almost two years after it was filed seeking injunctive relief and state statutory penalties. Most of the injuries claimed by the state of Illinois, including their claims that Defendants' actions adversely affected the public health, increased the cost of meeting Clean Air Standards, and deprived Illinois of the economic development that a larger ethanol industry would have brought, are not of the type that the antitrust laws were intended to redress.

The State's prayers for statutory penalties were dismissed in July of 1990, leaving the State in this case only for injunctive relief.

The State of Illinois has been a follower in this case and has candidly stated that it "does not have the allocable resources to vigorously pursue the prosecution of this lawsuit on its own, absent the resources of private counsel. . . ."

In addition, the State of Illinois' complaint is clearly rendered from the complaint of the private Plaintiffs. Likewise, the contentions and proof of State of Illinois are not discussed separately in the Final Statement of Contentions and Proof. Yet, it is clear from the record that the State of Illinois case is not the same as the private Plaintiffs. For example, Plaintiffs allege that the Defendants violated the Sherman Act and the Gasohol Competition Act of 1980 with their "no alcohol" advertising, yet in the Final Statement of Contentions and Proof only three Defendants are identified as having conducted such advertising campaigns

within Illinois. In addition, a 1986 map included in the last appendix to Plaintiffs' Final Statement shows the percentage of ethanol blends (presumably as compared to all motor fuel sales) at more than 24 percent. By contrast, in some states ethanol blend sales are less than 1 percent of total motor fuel sales. Obviously, this raises significant questions about whether the Illinois motor fuels market was affected by any of Defendants' alleged antitrust violations. Plaintiffs' Final Statement, however, simply fails to focus in on this or many other points that bear on the State of Illinois' claim.

Should the State of Illinois wish to pursue its claims, it would be in the best interest of both the parties and the Court if it did so in a new suit tailored to its individual situation.

III. CONCLUSION

Ergo, Count III of the Plaintiffs' and Intervenors' complaints alleging monopolization activities in violation of § 2 of the Sherman Act and that part of Count IV that alleges monopolization activities in violation of the Illinois antitrust laws are DISMISSED WITH PREJUDICE.

Defendants' Motion for Summary Judgment based on Plaintiffs' Lack of Antitrust Injury and Standing is ALLOWED IN PART as it pertains to Counts I and II alleging, respectively, "a contract, combination or conspiracy" in violation of section 1 of the Sherman Act and violations of the Gasohol Competition Act of 1980, section 26a of the Clayton Act.

The State of Illinois claims under Counts I and II are DISMISSED WITHOUT PREJUDICE. The Illinois Fraud and Deceptive Practices Act claim under Count IV and the commercial disparagement claim in Count V are DISMISSED WITHOUT PREJUDICE for lack of jurisdiction.

APPENDIX C

§ 26a Restrictions on the purchase of gasohol and synthetic motor fuel

(a) Limitations on the use of credit instruments, sales, resales, and transfers

Except as provided in subsection (b) of this section, it shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that —

(1) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol other synthetic motor fuel of equivalent usability in any case in which there is no similar limitation on transactions concerning such person's conventional motor fuel; or

(2) otherwise unreasonably discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability in any case in which such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States.

(b) Credit fees; equivalent conventional motor fuel sales; labeling of pumps; product liability disclaimers; advertising support; furnishing facilities

(1) Nothing in this section or in any other provision of law in effect on December 2, 1980, which is specifically applicable to the sale of petroleum products shall preclude any person referred to in subsection (a) of this section from imposing a reasonable fee for credit on the sale, resale, or transfer of the gasohol or other synthetic motor fuel referred to in subsection (a) of this section if such fee equals no more than the actual costs to such person of extending that credit.

(2) The prohibitions in this section shall not apply to any person who makes available sufficient supplies of gasohol and other synthetic motor fuels of equivalent usability to satisfy his customers' needs for such products, if the gasohol and other synthetic fuels are made available on terms and conditions which

are equivalent to the terms and conditions on which such person's conventional motor fuel products are made available.

(3) Nothing in this section shall —

(A) preclude any person referred to in subsection (a) of this section from requiring reasonable labeling of pumps dispensing the gasohol or other synthetic motor fuel referred to in subsection (a) of this section to indicate, as appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person;

(B) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel;

(C) require such person to provide advertising support for the gasohol or other synthetic motor fuel; or

(D) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel.

(c) Definition

As used in this section, "United States" includes the several States, the District of Columbia, any territory of the United States and any insular possession or other place under the jurisdiction of the United States.

APPENDIX D

SENATE REPORT NO. 96-868

PROHIBITING DISCRIMINATION AGAINST THE SALE OF GASOHOL

July 25 (legislative day, June 12), 1980. —
Ordered to be printed

Mr. Metzenbaum, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 2251]

The Committee on the Judiciary, to which was referred the bill (S.2251) to amend the Clayton Act to prohibit discrimination against the sale of gasohol or other synthetic motor fuels, reports favorably thereon with an amendment to the bill and recommends that the bill as amended do pass.

In favorably reporting S.2251, the Gasohol Competition Act, the committee recognizes this country's urgent need for the rapid and effective development of viable alternative fuels to offset our dangerous dependence on insecure and costly sources of foreign oil. The commitment of this Congress and the administration to encourage the development of gasohol and other synthetic fuels cannot be doubted. But if consumers do not have the freedom to choose alternative fuels, efforts to encourage alternative fuel development will be frustrated.

During the winter of 1979-1980, several major oil companies sought to deter the free marketing of gasohol. Companies refused to permit their pumps and tanks to be used for the sale of gasohol. Several companies even threatened to terminate their franchisees' contracts if they even offered to sell gasohol. These actions were taken by companies that were not currently marketing gasohol themselves and had no current plans to begin its marketing.

In an attempt to end these restrictions, the Gasohol Competition Act was introduced on February 4, 1980, with 17 cosponsors.

Since its introduction, another 11 Members of the Senate have joined in cosponsoring the bill. Similar legislation has been introduced in the House of Representatives as well.

The Senate cosponsors of S.2251 are Senators Metzenbaum, Hollings, Bayh, Dole, McGovern, Church, Baucus, Kennedy, Culver, Nelson, Zorinsky, Melcher, Stone, McClure, Levin, Boschwitz, Eagleton, Thurmond, Heflin, Huddleston, Pryor, Pressler, Stewart, Leahy, Sarbanes, Matsunaga, Ford, Durkin, and Magunson.

The measure is not designed to force anyone into marketing, selling or purchasing gasohol or other synthetic fuels, nor is it designed to place burdensome requirements on those companies which choose not to market gasohol themselves. The act is simply intended to remove any potential obstacles that may be raised by the major oil companies to dealers who desire to market gasohol and other synthetic fuels which have reached the same level of quality and acceptability as gasohol. Although the committee strongly believes in the role gasohol can play in the country's energy conservation effort, it does not wish to force its beliefs on those with different views.

The committee recognizes that several of the blatantly discriminatory practices by the major oil companies against gasohol use have subsided. But it is the belief of the committee that we cannot afford to relax our vigilance in this area. Many companies altered their position regarding gasohol only in response to adverse publicity and public condemnation. Their underlying opposition to the marketing of gasohol continues.

Moreover, the committee wants to insure that dealers will be permitted to market newly developed alternative fuels when those fuels reach gasohol's level of quality and acceptability. The companies should not be permitted to raise new obstacles to the marketing of every new alternative fuel which is developed in the future.

The need to foster development and use of viable alternative fuels is apparent, as we cannot ignore the Nation's continuing dependence on insecure sources of oil. That dependence has left us at the mercy of foreign oil cartels, whose sharp increases in

prices and occasional but substantial interruptions in supply have contributed significantly to this country's current economic woes.

We must begin to explore new methods of conserving our use of conventional products made from imported fuels. Gasohol and other synthetic fuels will not accomplish our conservation goals overnight. In fact, they are unlikely ever to take the place of conventional fuels. But their use definitely will contribute to the enhancement of our energy independence. Gasohol is a product that is well-suited to rapid development and marketing.

Technology currently exists for gasohol's efficient manufacture, and even more improved methods are in the final experimental stage. Unquestionable, the requisite amounts of agricultural feedstocks for its production are readily available. Gasohol's rapid development will further the energy policy goal of extending our existing supplies of gasoline fuel, and also will provide a new market for the grain produced by the Nation's hard-pressed farmers. Gasohol is an energy source whose production does not require the massive investment needed for conventional petroleum fuels. It is an enterprise in which the small farmer and the small businessman readily can become involved.

Perhaps most importantly, the public desires to purchase gasohol. Partially because of patriotism and partially because of the benefits which result from a higher octane product, motorists in ever-growing numbers are demonstrating their acceptance of gasohol by purchasing larger and larger quantities of the fuel. By extending new-car warranty provisions to cover gasohol's use, major automobile manufacturers have also signified their acceptance of gasohol's viability as an alternative fuel.

The remaining obstacles to the promotion of gasohol as an alternative to conventional gasoline are the marketing barriers erected by the major oil companies. The committee believes that S.2251, as amended, will eliminate those barriers and permit the rapid development of gasohol and other synthetic fuels.

I. SUMMARY AND TEXT OF REPORTED BILL

As amended, S.2251 prohibits (1) certain limitations on the use of credit cards affecting gasohol and other synthetic fuels of equivalent quality and acceptability, and (2) other limitations on the sale of gasohol and other similar synthetic fuels that are discriminating or unreasonable.

An oil company may not treat synthetic fuels such as gasohol differently from the company's conventional motor fuel in its credit card policies under the act. Thus, if an oil company allows its franchised dealers to accept oil company credit cards for the purchase of the company's branded gasoline, then the dealer must also be allowed to accept the oil company credit card for the sale of gasohol. It is the premise of the act that the public must have access to gasohol and other synthetic fuels immediately, and that the product be as accessible to the consumer as is conventional motor fuel.

The act also addresses impediments devised by the oil companies other than credit card policies. It prohibits the setting of conditions which "discriminate against or unreasonably limit" the sale of gasohol or other synthetic fuels.

The use of the word "discriminate" in paragraph (ii) of the act is not intended to eliminate all differentiation between gasohol and gasoline. Although both are motor fuels, they are products whose characteristics differ to a certain extent. Therefore, actions or policies that differentiate between the two based on actual, proven differences would not be precluded by this act.

Paragraph (ii) also prohibits unreasonable limitations on the sale of gasohol and other synthetic fuels. The phrase "unreasonably limits" was used to cover obstacles to the marketing of gasohol that were not necessarily discriminatory.

The act is intended to meet the national need for expeditious marketing of synthetics such as gasohol without placing unreasonable restraints on major oil companies' marketing practices. The act specifically identifies actions which the companies may take with respect to the sale of synfuels such as gasohol without violating the act's prohibitions against discrimination and unrea-

sonable limitations. In particular, the act would not preclude major oil companies from requiring reasonable labeling of pumps dispensing synthetics such as gasohol to indicate that the fuel is not a company product. The act also will not preclude oil companies from issuing appropriate disclaimers of product liability for damage resulting from use of such synthetic fuels. Nor would the act require major oil companies to provide advertising support for gasohol and other synthetic fuels or provide additional pumps, tanks, and related facilities for the sale of such synthetics. Thus, while the committee's intent is to provide consumers with ready access to gasohol and other similar synthetic fuels, it is not intended to force any company into developing and selling gasohol if it does not choose to do so on its own.

The full text of the bill follows:

A BILL

To amend the Clayton Act to prohibit restrictions on the use of credit instruments in the purchase of gasohol

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this act may be cited as the "Gasohol Competition Act of 1980."

SEC. 2. The Clayton Act is amended by renumbering the present "SEC. 26" as "SEC. 27" and inserting the following new section as section 26:

"SEC. 26. It shall be unlawful for any person engaged in commerce, in the curse of such commerce, directly or indirectly to impose any condition, restriction, agreement, or understanding that —

> "(i) Limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where there is no similar limitation on transactions concerning such person's conventional motor fuel: *Provided*, That nothing in this section or in any other provision of law in effect on the date of enactment of this Act and which is specifically applicable to the sale of petroleum products, shall preclude such person from imposing a reasonable fee for credit on the

sale, resale, or transfer of the gasohol or the other synthetic motor fuel if such fee equals no more than the actual costs to such person of extending that credit; or

"(ii) otherwise discriminates against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this section shall:

"(a) preclude such person from requiring reasonable labeling of pumps dispensing the gasohol or the other synthetic motor fuel to indicate, where appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed, or sold by such person; or

"(b) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of the gasohol or the other synthetic motor fuel; or

"(c) require such person to provide advertising support for the gasohol or the other synthetic motor fuel; or

"(d) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or other related facilities required for the sale of the gasohol or other synthetic motor fuel."

II. BACKGROUND AND NEED

A. THE NATION'S NEED FOR GASOHOL AND OTHER SYNTHETIC FUELS

1. *Current dependence on costly and unreliable foreign sources of oil*

The United States imports over 42 percent of the oil it consumes annually. Two-thirds of that amount (67 percent) is imported from members of the Organization of Petroleum Exporting Countries (OPEC) and an increasing percentage of

OPEC imports has been coming from the relatively unsecure Persian Gulf region. In 1970, for example, less than 6 percent of our imports were from Arab OPEC countries. By 1977, that amount had increased to 36 percent, here it remains today.

Recent developments in Iran have dramatized that our sources of supply from the Mideast are not secure. Moreover, even if we can be assured of supply, we are still forced to endure the massive OPEC increases. Since the Arab oil embargo of 1973, OPEC prices have increased by more than 1,000 percent. Over the past 16 months, during a period when the Western economics were contracting, OPEC has pushed prices up 150 percent. And just recently OPEC announced another $2 per barrel increase in prices, which brings the official price of the highest tier of OPEC oil to $37 a barrel.

To avoid dangerous international tensions, and to avoid the destabilizing economic effects of high prices coupled with insecure supply, the U.S. must find a way to generate greater energy self-sufficiency. This will entail a balanced approach of stretching our current energy resources through a concerted conservation effort, increasing our domestic petroleum production while cultivating new sources internationally, and developing alternatives such as solar energy, alcohol fuels and synthetic fuels including coal, shale, heavy oil and tar sands. In order to relieve our tenuous energy supply, the committee believes that domestically available alternatives to conventional oil and gas resources are necessary. It is to this effort that S.2251 is addressed.

In reporting out this legislation, the committee acknowledges that no effort to promote the development of alternative fuels will be successful unless there is a parallel effort to insure the free and open marketing of the alternative fuels in question. Discrimination against gasohol, the most acceptable alternative fuel currently available, has raised fears about the willingness of petroleum companies to incorporate its sale in their marketing network. This unwillingness on the part of the oil companies exists despite the retailers' desire to sell the product and the consumers' expressed wish to buy it. The longer it takes to integrate the sale of synthetics into the existing distribution system the longer we will be subjected to the vagaries of the

international petroleum markets and the harshness of cartel price actions.

B. ADVANTAGES OF GASOHOL AS AN ALTERNATIVE ENERGY SOURCE

Gasohol is the most readily available, near-term alternative fuel that could be used immediately to stretch our current petroleum resources. It has numerous advantages over much of our conventional gas and oil resources, and has enjoyed ready acceptance among the Nation's consumers. Gasohol has an advantage over conventional petroleum resources because its alcohol component is manufactured from renewable domestic resources. Not only can the alcohol itself be produced from grain feedstocks, but nonpetroleum products, such as wood or biomass residues, can be used as fuel in the distillation process itself, resulting in additional petroleum savings.[1] It is estimated in fact that an effective national gasohol program could save the United States 710,000 barrels of petroleum per day.[2]

Gasohol boosts the octane level in cars, improves drivability and is cleaner burning than conventional gasoline.[3]

Some studies show improved mileage per gallon with the use of gasohol.[4] Gasohol has been promoted by at least one major oil company (Texaco)[5] and has been approved for use by all three

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[1]Statement of W.F. Riddle and E.S. Lipinsky, Antitrust, Monopoly and Business Rights Subcommittee hearings, Mar. 5, 1980, at p.2. (Hereinafter, citations to oral testimony will be designated "Tr.". Citations in written submissions will be designated "W").

[2]Statement of Scott Sklar, subcommittee hearings, at W.3.

[3]Testimony of Joseph D. Hertel, subcommittee hearings, Tr. 56-57; testimony of Representative Berkley Bedell, subcommittee hearings, Tr. 20; statement of J.M. Seamons, Texaco, Inc., subcommittee hearings at W.4.

[4]William J. Lenouette, "Gasohol No Longer Laughing Matter as Carter Presses for More Production," National Journal, Feb. 9, 1980.

[5]Statement of J.M. Seamons, subcommittee hearing at W.3-4.

major domestic auto manufacturers.[6] All three have stated that the use of gasohol will not violate new-car warranty provisions.[7] Consumers have become increasingly receptive to the use of gasohol. As Texaco Vice President Seamons said:

> Texaco retailers report that the customers using gasohol seem to be receptive to both the product and to the benefits the higher octane rating provides. Many customers claim that Texaco lead-free gasohol provides more power and better performance than Texaco lead-free gasoline. Patriotism plays a part, in that many customers believe that by using gasohol, the nation's dependence on imported oil is lessened. (Testimony of J.M. Seamons, subcommittee hearing at Tr.4.)

The high-protein byproduct remaining after the distillation process can be utilized in animal feeds, for cooking oils and for other food uses.[8]

These byproducts have value in both human and animal diets related not to their energy content, but to their protein composition.

Proper integration of our energy and agricultural endeavors in the production of gasohol can stretch our imported petroleum supplies with a domestically produced, renewable resource that can serve also as a resource for production of animal and human food. The integration of these two policies is not something that we as a nation can afford to ignore.

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[6]Statement of Richard F. Curry, subcommittee hearing at W.1.

[7]Testimony of J.M. Seamons, subcommittee hearing at Tr. 116; testimony of Richard F. Curry, subcommittee hearing at Tr. 107, 109.

[8]Statement of Senator Birch Bayh before the U.S. National Alcohol Fuels Commission, May 2, 1980 at p.6; statement of Donald L. Hertzmark, subcommittee hearings at W.2.

Nor can we ignore the boon to farmers and small businessmen that an effective gasohol program can mean. One witness at the hearing said:

> The ultimate development of alcohol for fuel from grain crops we believe could lead to a phasing out of farm programs relating to corn and feed grains and provide a significant savings to our Federal Treasury. (Testimony of Dean Simeral, subcommittee hearing at Tr. 29.)

Today, the stage is set for a significant national gasohol production effort. President Carter has made alcohol production a key component of his alternative fuels program. Major auto manufacturers, as stated before, have demonstrated their acceptance of gasohol by extending their new car warranties to cover the use of gasohol. Consumers are ready and anxious to buy the product. Rapid promotion of gasohol use cannot take place, however, without the cooperation of major oil companies who control the motor fuel distribution network, as witnesses at the gasohol hearings pointed out.[9]

Major oil companies cannot be permitted to stand in the way of expeditious development of gasohol. Some, most notably Texaco, have embarked on their own gasohol development program, which is to be applauded. Others have begun much smaller experimental programs. But many others continue to denigrate the product and have raised barriers to the free marketing of gasohol by their independent franchisers who wish to serve the public through the sale of gasohol. Such discrimination against gasohol sales cannot be permitted to continue. It is the committee's intent in reporting out this legislation to preclude such discrimination in the future.

C. ANTIGASOHOL PRACTICES OF THE OIL COMPANIES

Few major oil companies have done anything to encourage or facilitate the marketing of gasohol by their independent franchis-

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[9]Testimony of Representative Thomas A. Daschle, subcommittee hearing at Tr. 23.

ees. Most have taken steps to discourage its role. Most notable were announcements by major companies this winter that they not permit the charging of gasohol on company credit cards.[10] In the glare of severely adverse publicity the companies withdrew their previously announced gasohol credit card policies, although at least one of the top major refiners left open the possibility that that policy would be altered again at any time.[11]

According to one witness, one major oil company subjected its retailers who sold gasohol to delays in processing their credit card invoices, creating cash flow problems for them.[12]

The delays were accomplished through hand-processing as opposed to computer processing of invoices, and by large lag times in the mailing of checks.

Retailers appearing at the joint hearings held by the Senate Antitrust Subcommittee and the Senate Small Business Subcommittee testified to a number of other discriminatory practices employed by the oil companies. These included threats to terminate the franchises of dealers who sold gasohol,[13] refusals to permit franchises to use company-supplied gasoline for their gasohol mixtures,[14] unreasonable labeling requirement which precludes the franchise from marketing gasohol,[15] and refusals to

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[10]"Use Gasohol, pay in cash," Washington Post, Jan. 9, 1980 at p. D-10.

[11]See Exxon press release of January 11, 1980, entitled "Exxon Permits Sale of Gasohol on its Credit Cards."

[12]Testimony of Wayne Konitshek, subcommittee hearing at Tr. 81.

[13]Testimony of Victor Cino, subcommittee hearing at Tr. 67, 73; testimony of Wayne Konitshek, subcommittee hearing at Tr. 76-77.

[14]Testimony of Alfred M. Campbell, III, subcommittee hearing at Tr. 93-94.

[15]One major oil company required its franchisee to use a special kit to "de-brand" the pumps but failed to make those kits readily available, placing the dealers in a helpless "Catch 22" situation. Testimony of Victor Cino, subcommittee hearing at Tr. 69; testimony of Joseph B. Hinton, subcommittee hearing at Tr. 166-168.

permit franchisees to use existing company tanks and pumps for gasohol despite the absence of any problems of commingling gasohol with the dealer's conventional gasoline.[16]

Prospective marketers of gasohol also testified about subtle threats by the major oil companies which had the effect of discouraging their sale of gasohol. For example, the dealers pointed to continued changes in company gasohol policies which left them in the dark about the conditions under which they could market gasohol if they chose to do so. Moreover, many of the major companies have consistently denigrated gasohol, attacking it on grounds of its energy inefficiency, cost, poor quality and its damaging effect on automobiles. Dealers at the hearings maintained that a company's antigasohol attitude coupled with strongly worded suggestions that they must check with company representatives before they begin marketing gasohol, which left the clear impression that dealers endanger their relationship with the company if they enter the gasohol business. As Victor Cino, a representative from the Greater New Jersey Service Station Association testified:

> We are of the opinion, based on the data compiled for this hearing, that most of the major oil companies have made serious attempts to limit or exclude, and certainly to discourage, the sale of gasohol through major brand retail outlets. (Statement of Victor Cino, subcommittee hearings at W.2.)

It should be noted that the committee does not accept as valid or significant any of the claims made against gasohol by some of the major oil companies. On the contrary, the committee believes that gasohol is a proven product, with demonstrated advantages and clear acceptance by the consuming public.

D. NEED FOR SPECIFIC ANTITRUST LEGISLATION

The committee is aware of a significant body of case law which could be held to preclude exclusive dealing and tying arrangements involving the supply of gasoline and other petroleum

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[16]Testimony of Representative Berkley Bedell, subcommittee hearing at Tr. 18.

products, including gasohol. *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949); *Siegel v. Chicken Delight, Inc.* 418 F.2d 43 (9th Cir. 1971), cert.denied, 405 U.S. 955 (1972); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976); *Aamco Automatic Transmissions, Inc. v. Tayloe*, 407 F.Supp. 430 (E.D. Pa. 1976).

Specific issues concerning how far existing antitrust law permits major oil companies to go in limiting competition from noncompany automobile fuels in the name of protecting trademark rights or controlling use of their equipment are currently being litigated. The committee is aware of the ongoing challenges to oil company practices and cognizant of the implications such case law can have for protecting branded retailers who want to promote and market gasohol.

The committee is also aware of the protracted nature of the litigation that would, in all probability, be necessary to assure all service station dealers a right to market gasohol at their stations under the applicable antitrust provisions. Because of the national energy emergency, any delay in assuring the fullest opportunities for competitive marketing of gasohol through the existing network of automotive service station outlets would be intolerable. We must provide as soon as possible a business climate that will encourage all those who want to market gasohol — for business as well as patriotic reasons — to do so now.

It is for that reason that the committee has acted so expeditiously in recommending passage of this legislation, targeted specifically at the open marketing of gasohol. The committee, in reporting out this legislation, did not intend to imply that existing antitrust law permits oil companies to hinder the sale of gasohol or other nonbranded petroleum products. The legislation is simply an effort to expedite the opening of the existing motor fuel distribution network to new products that may help cope with the top national priority of diminishing our dependence on insecure and costly sources of foreign oil.

III. THE PROVISIONS OF S. 2251

S. 2251 amends the Clayton Act by inserting a new section 26 that would prohibit those engaged in petroleum refining and marketing from discriminating against or unreasonably limiting the sale of gasohol or other synthetic motor fuels.

Paragraph (i) specifically addresses the use of credit card practices that would inhibit the sale of gasohol and other equivalent synthetic motor fuels. Under this paragraph, an oil company is free to adopt any credit care policy it chooses for the sale of its own products, so long as that policy applies equally to the sale of gasohol or other synthetic fuels. Thus, the act does not interfere with an oil company's right to set its own credit policies. It simply prevents the company from using those policies in a discriminatory manner to make the conservation of oil by consumers more difficult.

Even if the oil company does not permit its credit card to be used for the sale of noncompany products, it must permit its card to be used for the purchase of gasohol and other synthetic fuels if it permits its card to be used on its own petroleum products. This is consistent with the goals of this legislation to prevent discrimination against gasohol vis-a-vis an oil company's conventional petroleum products.

Paragraph (i) also provides that an oil company may impose a reasonable fee for the extension of credit on gasohol and other synthetic motor fuel sales if such fee equals no more than the actual costs to the company of extending that credit. This problem arises because of Department of Energy regulations in effect at the time this bill was reported out of committee that precluded companies from charging service fees for the extension of credit because they had not been doing so at the time petroleum price controls went into effect. As long as that regulation is in effect and no across-the-board price control regulations exist, it is the intent of the committee to have the provisions of this bill supersede the DOE regulations with respect to service fee charges for the extension of credit on sales of gasohol and other synthetic fuels.

If such DOE regulations were repealed subsequent to the passage of this act or if broader price control regulations applica-

ble to more than just the sale of petroleum products were put into effect, then the provision in paragraph (i) permitting companies to charge reasonable fees for the extension of credit would be inapplicable.

The reasonable fee which may be imposed is limited to the actual costs which the credit issuers have historically attributed to the extension of credit on the sale of conventional fuel. Since it is technologically and economically unfeasible to segregate costs and apportion them to particular products, the costs used to calculate the credit fee can be based on the annual, average net cost of maintaining a company's credit card system assessed equally to all credit invoices regardless of product.

It should not be considered discriminatory under the act for oil companies to insist on a reasonable system of identifying their retailers' credit card gasohol sales in order to assess the appropriate credit card fees.

The term "gasohol" refers to any motor fuel composed of 90-percent gasoline and 10-percent alcohol.

The term "synthetic motor fuel of equivalent usability" refers to any synthetic motor fuel that has reached the same level of quality and acceptability as gasohol. Synthetic motor fuels of "equivalent usability" would be those which are as efficient, as safe, and as nonharmful as gasohol currently is.

Paragraph (ii) of the act is a more general prohibition against other actions by oil companies that "discriminate" against or unreasonably limit the sale of gasohol or other equivalent synthetic motor fuels.

The use of the word "discriminate" in paragraph (ii) of the act is not intended to eliminate all differentiation between gasohol and gasoline. Although both are motor fuels, they are products whose characteristics differ to a certain extent. Therefore, actions or policies that differentiate between the two based on actual, proven differences would not be precluded by this act. For example, a requirement that a franchise station indemnify an oil company for damage to its leased equipment, should the damage

be proven to be directly attributable to the properties of gasohol, would not be unlawful under this act.

Paragraph (ii) also prohibits unreasonable limitations on the sale of gasohol and other synthetic fuels. The phrase "unreasonably limits" was used to cover obstacles to the marketing of gasohol that were not necessarily discriminatory. For example, if an oil company forbids the use of its pumps and tanks for dispensing any noncompany product, gasohol is not singled out, but its sale is impeded. This limitation, although nondiscriminatory, should be prevented and will be reached under paragraph (ii) of this act.

Subparagraph (ii)(a), (b), (c), and (d) further clarify practices that would not be considered discriminatory or unreasonable under the act.

Subparagraph (ii)(a) further clarifies that oil companies may, consistent with this act, require reasonable labeling of pumps dispensing gasohol or other equivalent synthetic motor fuels indicating that the product is not a company product. The labeling requirement must be a reasonable one; that is, compliance with the requirement must not entail prohibitive expense by the retailer desiring to market gasohol.

The labeling proviso is not meant to displace existing antitrust and trademark law governing anticompetitive restraints in the context of trademark licensing. It is not intended to preclude challenges to such labeling requirements under other provisions of the Sherman or Clayton Acts as being contrary to the antitrust laws in the context of service station franchises.

Subparagraph (ii)(b) would permit oil companies to issue appropriate disclaimers of product liability for damage resulting from use of the gasohol or other synthetic motor fuel. Although the committee believes such disclaimers are in fact unnecessary because of the proven quality of gasohol in particular, it is willing to accommodate the desire of companies wishing to disclaim liability for a product they do not produce. Of course, disclaimers about unsubstantiated and undocumentable risks associated with the use of gasohol or other synthetic fuels, issued for the purpose of discouraging the consumption and marketing of gasohol would

not be permitted under this act. The disclaimers must be "appropriate."

Subparagraph (ii)(c) clarifies that the act would not require oil companies to provide advertising support for gasohol or other synthetic fuels.

Subparagraph (ii)(d) clarifies that the act would not require oil companies to furnish at their own expense additional pumps, tanks or other related facilities required for the sale of the gasohol or other synthetic motor fuel. The act does require, however, that oil companies permit existing tanks, pumps and related facilities to be used for the sale of gasohol or other synthetic motor fuels, unless there exist technical problems of commingling the synthetic motor fuels with the company's conventional gasoline. As noted earlier, failure to permit existing tanks and pumps to be used for gasohol and other synthetic fuels, while not discriminatory, would be considered an unreasonable limitation on the sale of such products, particularly given the immediate national priority of stretching our existing conventional petroleum resources.

IV. HISTORY OF THE BILL

In February of this year, Members of Congress learned that several major oil companies were not permitting their credit cards to be used for the purchase of gasohol. Although this policy ultimately was altered in the glare of adverse national publicity, concerns remained that similar policies would be invoked once again as soon as the reaction subsided. Moreover, further investigation revealed other, more subtle forms of discrimination against gasohol also taking place.

As a result on February 4, 1980, 17 Senators introduced S.2251, the Gasohol Competition Act of 1980. Since that time an additional 11 Senators have joined as cosponsors.

On March 4, a parallel measure, H.R. 6691, was introduced in the House with 50 cosponsors. On March 5, 1980, joint hearings on S.2251 were held by the Senate Judiciary Subcommittee on Antitrust Monopoly and Business Rights and the Senate Select Committee on Small Business. Ten Senators, from both sides of

the aisle, attended and heard testimony from farmers, gasoline retailers and marketers, the Automobile Association of America, a panel of experts on the production of gasohol and representatives of several major oil companies. After the hearing, in response to comments received from many different sources, including the oil companies themselves, a substitute bill was drafted. That substitute was polled out of the Subcommittee on Antitrust, Monopoly and Business Rights on June 3, by a vote of 10 to 0. On June 17, an amendment in the nature of a substitute, incorporating the changes made by the subcommittee and an additional technical change in the numbering of the sections was ordered favorably reported by the full Judiciary Committee by unanimous consent.

V. RECORD VOTES IN COMMITTEE

SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS

YEAS	NAYS
Kennedy	
Bayh	
Culver	
Leahy	
Baucus	
Metzenbaum	
Thurmond	
Mathias	
Laxalt	
Hatch	

JUDICIARY COMMITTEE

The bill was reported out by unanimous consent.

VI. ESTIMATED COSTS

In accordance with section 252(a) of the Legislative Reorganization Act (2 U.S.C. 190(j)), the committee estimates that there will be no additional cost to the Federal Government due to this act. On June 9, 1980, the following opinion was received from the Director of the Congressional Budget Office.

U.S. CONGRESS
CONGRESSIONAL BUDGET
OFFICE

Washington, D.C.
June 9, 1980

Hon. Edward M. Kennedy,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: At the request of the committee staff, the Congressional Budget Office has reviewed S.2251, a bill to amend the Clayton Act to prohibit restrictions on the use of credit instruments in the purchase of gasohol, as introduced and referred to the Senate Committee on the Judiciary on February 4, 1980.

This bill would outlaw actions that discriminate against the sale of gasohol or other synthetic motor fuels, including limits on the use of credit in the sale of gasohol or other synthetic motor fuels that are not similarly applied to conventional motor fuels. It is expected that no cost to the Federal Government will be incurred as a result of enactment of this bill.

Sincerely,

Alice M. Rivlin, Director.

VII. REGULATORY IMPACT STATEMENT

The committee believes that the regulatory impact of this bill will be minimal. The bill creates no new enforcement agencies or procedures. If anything, it will expedite the resolution of disputes with respect to the marketing of gasohol and other synthetic

motor fuels that otherwise could take several years of litigation to resolve.

VIII. EXECUTIVE COMMUNICATIONS

FEDERAL TRADE COMMISSION,
BUREAU OF COMPETITION,
Washington, D.C., April 9, 1980.

Re Senate Bill No. 2251.

Hon. Howard M. Metzenbaum,
Chairman, Subcommittee on Antitrust, Monopoly and Business Rights, Committee on the Judiciary, U.S. Senate, Washington, D.C.

Dear Senator Metzenbaum: In response to your letter request dated March 11, 1980, we have reviewed the bill you recently introduced to amend the Clayton Act to eliminate unnecessary and anticompetitive restrictions on the sale of gasohol at branded retail gasoline stations. As you and the other sponsors noted when introducing S.2251, gasohol and other synthetic fuels may come to play a vital role in our Nation's energy policy, since such fuels utilize domestic resources rather than foreign oil. For this reason, we believe[1] that expressly relieving dealers from unreasonable impediments to the sale of alternative motor fuels, such as gasohol, would be beneficial to the consumer.

S.2251 appears to address three specific problems in branded gasoline retailing that may have the effect of unreasonably restricting consumer choices with respect to gasohol. One such problem is the reported practice of certain major oil companies that discriminate against gasohol — but not against "radios, calculators, briefcases, glassware and countless other nonpetroleum

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[1]The views expressed herein are those of the Bureau of Competition, and have not been approved by the Federal Trade Commission, nor any Commissioner.

products"[2] — when credit card holders seek to use the company's credit card to finance the purchase of such noncompany items. S. 2251 would expressly prohibit credit restrictions against gasohol, if the oil company does not impose such restrictions on sales of its own conventional motor fuel.

The second problem addressed by S.2251 is the nearly universal practice among major, integrated refiners of imposing contractual provisions on lessee dealers prohibiting the use of refiner-owner station tanks and pumps for storage or dispensing of products not supplied by the refiner. Where the refiner does not supply gasohol, this practice in effect precludes franchised dealers from selling gasohol, even absent a showing that gasohol would damage the refiner's equipment.

The third problem that would be addressed by S.2251 is the practice by which some oil companies prevent their independent dealers from carrying products, such as gasohol, supplied by other suppliers, even when the dealer clearly labels the alternative product as not a company product. Where such labeling is clear, there should be no question of trademark abuse or consumer confusion. The effect of such restrictions is simply to prevent full, competitive availability of gasohol.

Paragraph (i) of the language S.2251 specifically deals with the first of these three impediments to gasohol distribution; that is, credit cards. As to the second and third problems, which are covered by the "discriminates against or unreasonably limits" language in paragraph (ii), these problems may already be reachable under section 3 of the Clayton Act or section 5 of the Federal Trade Commission Act if it can be shown that such practices are the result of illegal tying or exclusive dealing contracts.

We respectfully suggest that because this legislation proposes favored competitive treatment for gasohol, it should not be placed in the "tying" section of the Clayton Act, but rather added as a

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[2]126 Cong. Rec. S. 891 (daily ed. Feb. 4, 1980) (remarks of Senator Hollings).

new section to that statute.[3] Furthermore, we suggest that the subcommittee, in its consideration of gasohol legislation, insure that proposed amendments to the Clayton Act do not, directly or indirectly, legitimize restrictions that oil companies may presently impose of sales of unbranded motor fuels with respect to branded franchise relationships, to the extent such restrictions may violate section 3 of the Clayton Act or section 5 of the Federal Trade Commission Act, or any other antitrust law.[4]

Thank you very much for giving us this opportunity to comment on the competitive implications of S.2251. If we can be of any further assistance to you, please feel free to contact us.

Very truly yours,

Alfred F. Dougherty, Jr.,
Director, Bureau of Competition.

IX. CHANGES IN EXISTING LAWS

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill S.2251, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, and existing law in which no change is proposed is shown in roman):

"SEC. 26. It shall be unlawful for any person engaged in commerce, in the course of such commerce, directly or indirectly

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[3]Sec. 3 speaks to restrictions as "goods, wares, merchandise, machinery, supplies, or other commodities." This language apparently does not reach such items as credit, *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), or franchises, *Ungar v. Dunkin Donuts*, 531 F.2d 1211, fn. 4 at 1215 (3d Cir. 1976).

[4]The following statutory language may minimize the possibility that the legislation would legitimize otherwise unlawful conduct: "The provisions in this subsection shall be held to be in addition to, and not in substitution for, or limitation of, the provisions of any Act of Congress."

to impose any condition, restriction, agreement, or understanding that —

"(i) limits the use of credit instruments in any transaction concerning the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where there is no similar limitation on transactions concerning such person's conventional motor fuel: Provided, That nothing in this section or in any other provision of law in effect on the date of enactment of this Act and which is specifically applicable to the sale of petroleum products, shall preclude such person from imposing a reasonable fee for credit on the sale, resale or transfer of the gasohol or the other synthetic motor fuel if such fee equals no more than the actual costs to such person of extending that credit; or

"(ii) otherwise discriminate against or unreasonably limits the sale, resale, or transfer of gasohol or other synthetic motor fuel of equivalent usability where such synthetic or conventional motor fuel is sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States: Provided, That nothing in this section shall:

"(a) preclude such person from requiring reasonable labeling of pumps dispensing the gasohol or the other synthetic motor fuel to indicate, where appropriate, that such gasohol or other synthetic motor fuel is not manufactured, distributed or sold by such person; or

"(b) preclude such person from issuing appropriate disclaimers of product liability for damage resulting from use of gasohol or the other synthetic motor fuel; or

"(c) require such person to provide advertising support for the gasohol or the other synthetic motor fuel; or

"(d) require such person to furnish or provide, at such person's own expense, any additional pumps, tanks, or

other related facilities required for the sale of the gasohol or other synthetic motor fuel."

[SEC.26] *SEC. 27.*

SEC.26. If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Approved, October 15, 1914.*

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APPENDIX E

The parent company of petitioner Lakefield Ethanol, Inc. is Phillipi Equipment Company.

The parent company of petitioners Cajun Energy, Inc. and Public Terminals, Inc. is Dupre Investments, Inc.

These petitioners have no parent or subsidiary companies as described in Rule 29.1:

Greater Rockford Energy and Technology Corp.
Shepherd Oil, Inc.
Vidalia Ethanol, Ltd.
Alpebo, Inc.
Shreveport Ethanol, Inc.
A.E. Montana, Inc.
Cepo. Inc.
Texas Ethanol Producers
Wurster Oil Company, Inc.
High Plains Corp.

None of the petitioners has any subsidiaries as described in Rule 29.1.